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HOWARD'S
PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW YORK.

BY R. M. STOVER,
REPORTER.

VOLUME LVIII.

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SUPREME COURT.

WILLIAM M. KINGSLAND agt. STEPHEN B. M. STOKES and others.

Action against executor — Complaint need not aver his appointment as such — Demurrer to complaint.

Where a complaint, in an action to foreclose a mortgage executed by the defendant, as executor, alleges that he executed it as such executor:

Held, that the complaint was sufficient, and that it was unnecessary to allege the defendant's *appointment* as executor; he is presumed to be such as he has described himself.

Special Term, October, 1879.

S. B. M. Stokes, for demurrer.

Frederick de P. Foster, opposed.

VAN VORST, J.—This action is brought to foreclose a mortgage executed by the defendant Stephen B. M. Stokes, as executor of, and trustee under, the will of Elizabeth Borst, deceased, to the plaintiff. The defendant Stokes demurs to the complaint on the ground, as he claims, that it does not state a cause of action.

In support of the demurrer it is urged that the several facts tending to show the defendant to be an executor, including his appointment as such, and the name of the court from whence letters testamentary issued, and the county in which the same was located, are all material and traversable and should be alleged in the complaint and stated in an issuable form.

Kingsland agt. Stokes.

The complaint alleges that the defendant, as executor, &c., executed the mortgage. That is a sufficient statement.

Holliday agt. Fletcher (2 *Ld. Raymond*, 1510) is an express authority for the statement that suing one as administrator "did, of necessity, imply that administration was committed" to him. In a late case (*Skelton agt. Scott*, 18 *Hun*, 375) it is held that, in an action to foreclose a mortgage given by an executor, it is unnecessary to allege in the complaint his appointment as such.

The rule seems to be different where one sues as executor, in which case he must aver his appointment and title as such executor (*Moak's Van Santvoord's Pleadings* [3d ed.], 226). The cases cited by defendant's counsel are of that kind. But I should conclude that in declaring against one upon an instrument in which he was described as executor, and which he executed as such, for the purpose of pleading, he may be presumed to be such an one as he has described himself.

Had the obligation, for the enforcement of which the action is brought, been one entered into by the defendant's testator, the facts relative to the appointment of the executor and the issuing to him of letters testamentary would have been necessary.

The demurrer is not well taken and there must be judgment for the plaintiff thereon, with costs.

No appeal.

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SUPREME COURT.

BOARD OF SUPERVISORS OF TOMPKINS COUNTY agt. GEORGE
H. BRISTOL and others.*Practice—Appeals—Costs—Affirmance of judgment where both plaintiff
and defendants appeal—proper entry in record—who entitled to costs.*

This action was commenced to recover of the defendant, Bristol, defaulting county treasurer, and his sureties, certain amounts of money alleged to have been misappropriated by Bristol. Such moneys belonged to several distinct funds, viz.: the county fund, the infant heir fund, the asylum fund and the military fund. Judgment was rendered by the referee for a certain amount of county funds and costs. Both plaintiff and the defendants (except Bristol) appealed. The general term affirmed the judgment. The memorandum or decision was, "judgment affirmed, with costs." The plaintiff thereupon entered judgment, having previously, on notice, taxed the costs of the appeal at \$172.88, and issued execution to collect the original judgment and costs of the appeal: *Held* (1st), that, as the plaintiff appealed from the entire judgment and on this appeal the judgment appealed from was affirmed; not in part but *in toto*, the respondents were entitled to their costs by law as a matter of right.

(3d). The defendants (except Bristol and Hathaway) also appealed in like manner as did the plaintiff; that is from the entire judgment. On this appeal, too, the decision was, that the judgment should be affirmed, and it necessarily follows that the respondent, on this appeal, was entitled to costs. The court could not deprive the respondents on each separate appeal, of costs, because, they were awarded by law as a matter of absolute right.

The memorandum or order of the general term was "judgment affirmed, with costs: "

Held, that this memorandum should have been followed on the record, by a judgment declaring the decision or adjudication suggested by it, fully, as regards any, and all rights to which the parties were entitled under it.

There could be, regularly, but one judgment, both appeals having been heard together, and the judgment being one of simple affirmance whereby both were determined, that judgment should declare the affirmance, and should, in due form, award costs to the parties entitled to them by law, and against those who were by law bound to pay them. To this end there might be separate clauses in the entry of judgment.

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Where, as in this case, a set-off of costs would seem proper, a clause to that end, following explanatory recitals, might be entered, if not without application to the court certainly on application at special term. It was within the just scope and power of the special term to correct and perfect the record as regarded the proper entry of judgment upon the facts disclosed.

The special term should have recognized the rights of the respondents on each appeal to costs; and should have directed a set-off of the respondents' costs on the appeal taken by the plaintiff in reduction of the amount of the recovery against the former, and limited the recovery and execution against them to the balance only.

An entry of judgment is irregular, which awards costs of appeal against a party who has not appealed. He is not chargeable with costs with his associate defendants, who, without him, took the appeal. The costs of the appeals are allowable against the appellants only, as to whom the judgment was affirmed.

Third Department, General Term, September, 1879.

Before LEARNED, P. J., BOOKES and BOARDMAN, JJ.

THE plaintiffs sued Bristol, defaulting county treasurer, and his sureties to recover \$5,194 county funds and \$7,997 funds of infant heirs. Judgment was rendered by the referee for \$6,130 county funds and costs. Both parties appealed. The defendants appealed "from the said judgment and every part thereof," and excepted specifically to the finding of fact and conclusions of law upon which the referee based his judgment.

The general term affirmed the judgment, with costs.

The plaintiffs thereupon entered judgment, having previously, on notice, taxed the costs of the appeal at \$172.83, and issued execution to collect the original judgment and costs of the appeal.

The plaintiffs never appealed from the judgment as directed by the referee, they sought, in the appellate court, to increase it by the items rejected by the referee.

The defendants moved to set aside the judgment and execution, and the special term, upon that motion, made the

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order now appealed from, striking out from the judgment and execution the costs of the appeal to the general term.

The order appealed from was made by MARTIN, J., and is as follows :

Upon the printed case on appeal, the printed points, the opinion of the general term, the affidavit of F. M. Finch, with copies of order of affirmance and of execution, a motion having been made to set aside the judgment entered in this action on the 28th day of January, 1879, against the defendants for \$316.53, after hearing Mr. Finch for the motion and Mr. Ellsworth in opposition,

Ordered, that the judgment entered in this action above set forth be modified by reducing the said judgment to the sum of \$143,70, as of January 28, 1879, and the execution in the hands of the sheriff is hereby modified by deducting therefrom the sum of \$172.83.

P. G. Ellsworth, for plaintiff. I. The judgment, and every part thereof from which the defendants appealed, was affirmed, with costs, and thus gave plaintiffs costs of the appeal. The defendants' point on appeal was this: "The judgment should be affirmed as to the infant heir fund and the military fund, but should be reversed as to the county fund for the reasons stated in the motion for nonsuit." The plaintiffs excepted to the portion of the referee's report respecting the infant heir fund and military fund, and asked that the judgment be increased by the amount of that fund proved. This the appellate court refused to do.

II. No part of the judgment from which the defendants appealed was reversed, but it was affirmed, with costs. The order of special term striking out costs of the appeal should be reversed.

F. M. Finch, for defendants. I. The true construction to be given to the order of the general term is that it awarded costs to the successful party on the appeal. The order reads :

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"Judgment affirmed, with costs." The court of appeals have held that such an order means with costs to the party who succeeds on the appeal (*Sisters of Charity agt. Mary Kelly*, 68 *N. Y.*, 628).

II. The defendants were the successful party on the appeal. If there is any doubt or ambiguity on this point it is to be solved by reference to the "circumstances of the case," the "nature of the appeal" and the "effects of the adjudication" (*Lawrence agt. Lindsey*, 70 *N. Y.*, 567). Such a reference leaves not a shadow of doubt behind it in this case. The plaintiffs, before the referee, suing for a general deficiency recovered on the county fund, but were beaten on the infant heir fund and military fund. Dissatisfied with the result, they appealed from the judgment in their own favor and, of course, sought its reversal as being too small. The defendants then appealed, but as the points and the opinion of the court show, not seeking a reversal, but on the contrary demanding an affirmance and making the appeal solely, that in case of a reversal an opinion might be given to guide a new trial on all the funds. The defendants' points, at the very outset, said: "The defendants, however, do not ask a reversal of the judgment, and present no points for that purpose" (*Points*, p. 1). The reason for defendants' appeal is then stated. The argument then proceeds (thirteen pages) to show that the referee committed no error, and the judgment should be affirmed. And the fifth and last point, which merely refers to the motion for a nonsuit, was framed to meet the possible emergency of a reversal, and in that case only the court was asked to pass on the referee's ruling as to the county fund. The oral argument itself was plain. The plaintiffs sought to reverse the judgment. The defendants sought to have it affirmed. That was the whole struggle, and not one word of argument or criticism as to the county fund was uttered. The written opinion of the general term shows the same thing (22 *Sup. Ct. Rep.*, 118). The court say: "Both the plaintiff and the sureties have appealed, but on the argument

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the counsel for the sureties stated that they asked no reversal of the judgment. Their sole object in appealing was, that in case of reversal an opinion should be expressed on certain points. The only matters then to consider are those raised by the plaintiffs as ground for the reversal of the judgment." On these facts it is difficult to comprehend the peculiar mental structure which could claim costs of appeal as due to a defeated appellant.

III. The plaintiffs succeeded in nothing on the appeal. The judgment was affirmed, but against their demand for a reversal. The defendants succeeded in all they asked. They sought an affirmance and it was granted. The order of justice MARTIN should be affirmed, and this strange experiment of plaintiffs counsel receive the condemnation it deserves.

BOCKES, J.—The difficulty in this case arises out of the irregularity in the practice adopted by the parties following the decision of the appeals.

Regarding the notes in the record, declaratory of the decision of the general term, as a memorandum merely, and the appeals have never been properly disposed of on the record. The memorandum should have been followed on the record by a judgment declaring the decision or adjudication suggested by it, fully, as regards any, and all rights to which the parties were entitled under it. The memorandum was, "judgment affirmed, with costs." There were cross-appeals—one was taken by the plaintiff, the other by the defendants (except Bristol and Hathaway); and, although both appeals were submitted to the court and decided by it, but one entry upon the record, declaring an affirmance of the judgment appealed from was necessary or proper, with an emendation or addition, awarding costs to the party or parties entitled thereto by law, or to such as the court should give costs to in case they were in the discretion of the court. In this case the costs were given by law, as "*of course*." Their allowance or disallowance was not in the discretion of the court. This is apparent

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on reference to the pleading, and to the provisions of the Code, relating to costs on appeal. The action was a common-law action for the recovery of money only, hence the successful party was entitled to costs by law, as a matter of right; and the same on appeal inasmuch as the judgment appealed from was wholly affirmed; not affirmed or reversed in part. The words "with costs" in the memorandum did not and could not, in this case, affect the rights of the parties in their claim to costs on the appeals. Their rights, in that regard, were fixed and determined by the law itself. If those words had been omitted the rights of the parties to costs would have been the same.

The entry of judgment was also irregular in this; costs of appeal were thereby awarded against Bristol, who had not appealed. He was not chargeable with costs with his associate defendants, who, without him, took the appeal. The costs of the appeals were allowable against the appellants only as to whom the judgment was affirmed (*Hawk agt. Bishop*, 10 *Hun*, 501). This error, however, Bristol should have corrected, on motion, at special term, rather than by appeal, the entry of judgment, as to him, having been made *ex parte*.

But this point is of no great moment in this case, as will be seen in the sequel.

Now, let us see how the parties stood on the record in this case. The plaintiff appealed from the entire judgment. On this appeal the judgment appealed from was affirmed, not in part, but *in toto*. The law declares, that if the judgment be affirmed, costs shall be awarded to the respondent. Therefore, on this (the plaintiff's appeal) the respondents were entitled to their costs by law, as a matter of right. So the Code declares, in express terms.

The defendants, except Bristol and Hathaway, also appealed in like manner, as did the plaintiff — that is, from the entire judgment. This appeal was also submitted to the court and was determined by it. On this appeal, too, the decision was that the judgment should be affirmed. So it necessarily fol-

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lows that the respondent on this appeal was entitled to costs. The right to costs was determined on this appeal, the same as on the plaintiff's appeal. Thus it is seen that the court could not deprive the respondents, on each separate appeal, of costs, because they were awarded by law as a matter of absolute right. Both were argued and submitted to the court for decision, and both were, in fact, decided. The judgment appealed from was affirmed.

Thus it is seen that the respondents, on each appeal, succeeded and became, as regards the respective appeals, a "successful" party.

The defendants' counsel urges that, although they (the defendants) appealed and, as the record shows, "from the whole judgment and every part thereof," yet they did not desire its reversal, and argued before the court to sustain it. They were, nevertheless, appellants on the record. A party cannot be allowed to escape the costs which the law gives to his successful adversary by aiding him to obtain them. The court must look to the record in giving effect to the law. The remarks of the court in *Wilson agt. Palmer* (5 *Weekly Dig.*, 507), with trifling change of language, will well apply here, as to the allowance of costs against an unsuccessful party on appeal. He cannot be allowed to say that it was not intended to review any particulars of the judgment, the appeal being from the entire judgment. He brings the appeal and must abide the consequences of its due disposition on the record. In this case the respondents, on each separate appeal, were entitled to costs.

But, as above suggested, there could be *regularly* but one judgment, both appeals having been heard together, and the judgment of simple affirmance whereby both were determined; that judgment should declare the affirmance, and should, in due form, award costs to the parties entitled to them by law, and against those who were by law bound to pay them. To this end there might be separate clauses in the entry of judgment. In this case, however, where a set-off of costs would

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seem proper, a clause to that end, following explanatory recitals, might be entered, if not without application to the court, certainly on application at special term. The motion here under review, was sufficiently broad and comprehensive to meet the exigency of the case on the facts. It was, within its just scope, to correct and perfect the record, as regarded the proper entry of judgment upon the facts disclosed. The decision of the motion at special term, should, as I think, have recognized the rights of the respondents on each appeal to costs, and should have directed a set-off of the respondents' costs on the appeal taken by the plaintiff, in reduction of the amount of the recovery against the former, and limited the recovery and execution against them to the balance only. It is competent for the court, now, on this appeal, to do what the special term should have done in the premises.

If correct in the conclusions above reached, the order appealed from should be modified in a way to meet the suggestions here made; and neither party should have costs against the other, either at the special term or on this appeal.

It is probable that the counsel will now agree upon the proper order to be entered, but, if otherwise, the order must be settled before one of the justices of the court.

NOTE. — Perhaps there may be some good reason why a set-off should not be made, as above indicated; and, perhaps, the counsel should be heard on this subject before entering an order in that regard. If so, the entry of judgment should simply contain separate clauses giving to the respective parties the costs to which the affirmance of the judgment entitled them. — (Per BOCKES, J.)

Zimmermann agt. Erhard and Dodge.

N. Y. COMMON PLEAS.

JOHN ZIMMERMANN and MARY ZIMMERMANN, plaintiffs and respondents, agt. PROSPER ERHARD and STEPHEN A. DODGE, defendants and appellants.

Husband and wife — partnership agreement between — The term "Co." legally representing the wife does not offend the provisions of the act of 1833, in relation to the use of this term.

A wife may contract with her husband in her business, and may enter into a valid partnership agreement with him under the laws of this state. Such being the fact the husband may lawfully use as the firm name "J. Zimmermann & Co.;" and the term "Co." legally representing the wife does not offend the provisions of the act of 1833 (*chap. 281*), providing that where the designation "& Co." is used it shall represent an actual partner.

General Term, June, 1879.

THE plaintiffs sued the defendants in the New York marine court to recover \$1,691.45 for goods sold and delivered.

Besides other defenses the defendants contended that the plaintiffs could not recover because they did business under the name of "J. Zimmermann & Co.," in violation of the statute of 1833 (*chap. 281*). That the said J. Zimmermann could not contract a lawful partnership with his wife, and that the words "& Co." did not, therefore, represent any actual partner and cited *Swords agt. Owen* (43 *How. Pr.*, 176); *Wood agt. E. R. Co.* (8 *Hun*, 648); *Marsh agt. Hop-pock* (3 *Bosw.*, 478) to sustain their position. Mr. justice MCADAM, before whom the action was tried without a jury, directed judgment for the plaintiffs for \$1,710.49, with costs.

The judgment having been affirmed on appeal by the general term of the marine court, the defendants appealed to the court of common pleas.

Zimmermann agt. Erhard and Dodge.

Edward Van Ness, for appellants.

Gleason & Cator, for respondents.

BEACH, J.—The appeal is by the defendants from an affirmance of the general term of the marine court, of a judgment rendered on a trial before a justice of that court without a jury. The plaintiffs are husband and wife, and at the times of the business dealings between the parties, were copartners under the firm style of J. Zimmermann & Co.; the defendants were also partners in trade. In 1877 the plaintiffs sold and delivered to the defendants, merchandise at an agreed price, which this action is brought to recover. The purchase of the goods is clearly proved by one of the defendants, and there is no disagreement in regard either to the price or delivery. It appears the defendants received accounts current, and addressed a letter to the plaintiffs apologizing for delay, and promising payment. They contend, however, under a denial in their answer of the partnership of the plaintiffs, alleged in the complaint, that there could be no legal partnership between the plaintiffs, and that therefrom results a violation of the statute forbidding the use of the designation "and Company," or "& Co.," unless representing an actual partner or partners. Judgment was rendered in favor of the plaintiffs, affirmed by the general term of the marine court, and the defendants bring this appeal.

The controlling and important question is, whether or not, there can be a valid copartnership between husband and wife. If that is decided affirmatively, it effectually disposes of the point made on behalf of the appellants, that the firm of John Zimmermann & Co. "was doing business in contravention of the statute of 1833 (*Laws of 1833, chap. 281, p. 404*), enacting 'where the designation "& Company," or "& Co.," is used, it shall represent an actual partner or partners.'" By the terms of the law, any person offending is guilty of a misdemeanor punishable by fine. It is apparent that if the busi-

Zimmermann agt. Erhard and Dodge.

ness relations between the plaintiffs were legal, there was no violation of the statute, and none of the consequences result, claimed by the appellants. It plainly appears from the record that an indebtedness exists, and the recovery had in the court below is, in my opinion, affected by no other important considerations than those resting upon the question suggested above. Under the statute (*Laws of 1860, chap. 90, p. 157; Laws of 1862, chap. 172, p. 343*) there have been numerous adjudications by the courts of this state; but I have failed to find one directly in point. It may be, however, considered settled law, that a married woman doing business on her sole and separate account may employ her husband as her agent in its control and management (*Knapp agt. Smith, 27 N. Y. R. 277; Buckley agt. Wells, 33 N. Y. R., 518; Gage agt. Dauchy, 34 N. Y. R., 293; Merchant agt. Bunnell, 3 Keyes, 539; Kluenner agt. Lynch, 4 Keyes, 361; Whedon agt. Champlin, 49 Barb., 61; Abbey agt. Deyo, 44 N. Y. R., 343; Bogert agt. Gulick, 45 How. Pr. R., 385*).

In *Adams agt. Curtis* (4 *Lansing*, 164), in deciding that she may maintain an action to recover compensation for services rendered to a firm of which her husband was a member, the court says:

"The effect and intent of the act (*Laws of 1860, chap. 90*) is to remove *all the disabilities of coverture*, so as to enable her to sue and be sued as to contracts, in all respects as though she was in fact unmarried."

It seems fairly deducible, from the above adjudications, that the wife is competent to contract with her husband in her business; and if so, there would seem to be no reason why she may not enter into a valid partnership agreement with him. It is a contract, affecting, directly, her business interests, and confers upon him no powers more extensive than those which would be his when acting as her general agent. He cannot affect a part of her personal estate uninvested in trade, any further in the one case than in the other. Partnership is founded upon agency, and the members of a firm are,

Zimmermann agt. Erhard and Dodge.

in their mutual relationship, both principals and agents. The words of the statute, "on her sole and separate account," refer to her marital *status* and are not intended to restrict her business ventures to those in which she shall alone be interested. This is greatly strengthened by the authorities affirming her power to join a partnership when her husband is not a member (*Hamilton et al. agt. Douglass*, 46 *N. Y. R.*, 218; *Plummer agt. Lord*, 5 *Allen*, 460).

In the case of *Cushman, Executors, &c., agt. Henry et al.* (not yet reported but found in the *Daily Register* of December 28, 1878) the court of appeals say, in considering the effects of the statute under review: "She may engage in business and incur the most dangerous, and even serious, liabilities in its prosecution, and they will be enforced against her to the same extent as if she was married."

It seems evident, from the above adjudications, that a married woman is invested by the logical effects of our legislation, in regard to her separate estate and business, with all the attributes and powers of a *feme sole*; and so being any contract made by her relative thereto is valid, including a copartnership agreement with her husband. An examination of the decisions in other states adverse to the above conclusion has not changed my opinion (*Lord agt. Parker*, 3 *Allen*, 127; *Plummer agt. Lord*, 5 *Allen*, 460, and 7 *Allen*, 481; *Knowles agt. Hull*, 99 *Mass.*, 562). The principle adjudged by them is the entire want of power in a *feme covert* to contract with her husband. This is not in accord with the cases in the courts of this state already cited; and while justly entitled to great respect those above should not, in such circumstances, be followed without question. In *Chambovet agt. Cagney* (35 *Superior Court R.*, 474), the eminent judge writing the opinion of the court admits it is not necessary to definitely decide the question at bar in that case. In expressing his judgment adverse to the conclusion here, he says: "In case a wife has separate property, although domestic circumstances may keep her home, or she may be kept there by the

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lawful exercise of a husband's power over her in a proper contingency, he will not have power to dispose of that property. If they were business partners he might legally keep her home and legally dispose of the partnership property at the place of business."

I have been led to differ from this reasoning, because the contingency suggested is equally likely to happen where her husband is general agent in the full control of her business; and, also, as to results when her personal estate is invested in a business wherein she is a partner with others. *In re Kinkead* (3 *Bissell C. C. R.*, 405) is a decision confirming the views here expressed. In that case the firm composed of husband and wife was adjudicated bankrupt. An individual creditor of the bankrupt, after proof of debt, claimed a dividend from the copartnership assets on the ground that the wife could not so contract with her husband, and the assets were, therefore, his in law and subject to the payment of his debts, equally with those of the firm. The creditor's application for a dividend was denied, and the decision of the district court affirmed on appeal.

In *Scott agt. Conway* (58 *N. Y. R.*, 619) a married woman, who apparently carried on a separate business, was held to the truth of that appearance, and in an action against her by one who dealt with her in ignorance of the partnership she was precluded from interposing the defense of her husband being a dormant partner. The case is not fully reported, and while the decision may not necessarily involve the point at bar it is cited as possibly beneficial to those, if any, who may further consider this question and be able to examine the opinions of the court.

It is suggested that, in the cases above cited holding adversely, the coverture has been uniformly plead by the wife for her own protection and advantage. There may be question as to its availability to the defendants here. It is also unnecessary to consider whether or not the case would be affected by the act of 1833. Should it be admitted that the

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wife was not competent to form a copartnership with her husband, or whether the defendants, having purchased and received from them property, could object in an action by them for the purchase-price, these questions would present matter for very serious consideration, and upon them I express no judgment, deeming it advisable to rest the decision upon the main and far more important question involved.

I am of the opinion that the plaintiffs' copartnership was legal and, consequently, the act of 1833 is not applicable to this case.

The judgment of the court below should be affirmed.

VAN BRUNT, *J.*—In the disposition of this case I do not think it necessary to pass upon the question as to whether or not, in this state, if a married woman enters into a copartnership with her husband she can avail herself of the defense of coverture, in an action by a creditor of the partnership to reach her individual property, for the reason that such a defense is entirely personal to her, and she may avail herself of it or not as she sees fit.

The defendants in this action cannot set up that defense for her; and as to them the copartnership is perfectly valid, even though the wife could avail herself of her coverture as a defense to an action by a creditor seeking to reach her separate property.

Judgment should be affirmed, with costs.

LARREMORE, *J.*, also concurred in the result.

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SUPREME COURT.

JAMES C. BEACH agt. WILLIAM M. HAYES, county treasurer
of Ulster county.

*Taxes and assessments — when court will intervene to prevent sale of lands
for non-payment of tax — Remedy by injunction.*

Where the statutes provided that "all real and personal estate liable to taxation be estimated and assessed by the assessor at its *full and true* value, as they would appraise the same in payment of a just debt due from a solvent debtor," and when the assessors had completed their roll they were required to make an oath which contained this clause: "We have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the *full and true* value thereof and at which they would appraise the same in payment of a just debt due from a solvent debtor," instead of which the oath of the assessors, appended to the assessment roll, read: "We have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the *fair proportionate value* thereof and at which, in the *same ratio*, they would appraise the same in payment of a just debt due from a solvent debtor:"

Held, that such a departure from the statute vitiates the entire assessment, and where a county treasurer had, under the provisions of the statute, advertised for sale the lands of the plaintiff for an unpaid tax, he is entitled to the preventive remedy of an injunction to restrain the sale of the same.

Where a deed, given by a public officer, is *prima facie* evidence of title, a party should have a preventive remedy, because there is then, if such deed is given an apparent cloud resting upon the title of the owner, which extrinsic evidence only can remove.

Where, as in this case, the treasurer's deed is, by law, made "presumptive evidence" that all the statutory provisions have been complied with, and if the plaintiff's property is sold and conveyance executed, the title in the purchaser will be, apparently and presumptively, complete, and can only be attacked and overthrown by affirmative evidence given by the plaintiff, the court is authorized to intervene by injunction and restrain the sale.

Ulster, Special Term, October, 1879.

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APPLICATION for an injunction to restrain the sale of lands for non-payment of a tax.

S. L. Stebbins, for motion.

F. L. Westbrook, opposed.

WESTBROOK, *J.*—By chapter 371 of Laws of 1879, chapter 65 of the Laws of 1878 is made applicable to the county of Ulster.

The defendant, as county treasurer, has, under the provisions of the act of 1878, advertised for sale the lands of the plaintiff for an unpaid tax claimed to have been levied in 1874.

The plaintiff insists that the alleged assessment is void because the assessors in attempting to make it disregarded the plain provisions of the statute in this particular. The law (1 *Ed. Statutes*, page 365, section 17) provides: "All real and personal estate liable to taxation shall be estimated and assessed by the assessor at its full and true value as they would appraise the same in payment of a just debt due from a solvent debtor."

By section 8 of chapter 176 of Laws of 1851 (3 *vol. Ed. Statutes*, 350) it is further provided, that when the assessors have completed their roll they shall appear before a justice of the town or city in which they reside and make an oath in the form therein prescribed, which form contains this clause: "We have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor."

The oath of the assessors appended to the assessment roll of 1874 shows that in making their assessments the assessors disregarded the law, for instead of swearing as the law directs they say: "We have estimated the value of the said real estate at the sums which a majority of the assessors have

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decided to be the *fair proportionate value* thereof, and at which, in the *same ratio*, they would appraise the same in payment of a just debt due from a solvent debtor."

The honesty of the assessors in admitting by their affidavit that they have disobeyed a statute command, and in not swearing that they have complied with the law when they have not, deserves commendation; but honesty on their part in confessing illegality cannot make their action, which is clearly invalid, valid. They were required to appraise the real estate liable to taxation in their town at its "*full and true value*," and "at which they would appraise the same in payment of a just debt due from a solvent debtor." Instead of doing so they have evidently appraised all at a less sum — some proportion thereof, which was maintained throughout, for they swear it is "the *fair proportionate value* thereof at which, in the *same ratio*, they would appraise the same in payment of a just debt due from a solvent debtor."

Manifestly such a departure from the statute vitiates the entire assessment; and this was conceded upon the argument, but it is claimed that the plaintiff is not entitled to the preventive remedy of an injunction, because the purchaser at the sale to make title will be compelled to produce not only his deed but the tax roll as well on which the error appears.

The rule of equity is now well settled that if a deed given by a public officer is *prima facie* evidence of title that a party has a preventive remedy, because there is then, if such deed is given, an apparent cloud resting upon the title of the owner which extrinsic evidence only can remove (*Guest agt. City of Brooklyn*, 69 N. Y., 506-513).

Chapter 65 of the act of 1878, section 10, provides that the deed of the county treasurer, given upon a sale of lands under the act, "shall be conclusive evidence that the sale was regular, and, also, presumptive evidence that all the previous proceedings were regular according to the provisions of this act." By the provisions of that act before the treasurer could sell (section 1) it was necessary that there should be an unpaid tax

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on the land "levied for state or county purposes in the manner hereinafter provided;" and that the same was validly assessed, because, by section 4, the treasurer must reject "all taxes on land * * * erroneously assessed in form or substance that the same cannot be enforced." Of all this, the treasurer's deed is by law "presumptive evidence," and if the plaintiff's property is sold and conveyance executed, the title in the purchaser will be, apparently and presumptively, complete, and can only be attacked and overthrown by affirmative evidence given by the plaintiff.

In other words this case is brought directly within that of *Guest agt. The City of Brooklyn* (69 N. Y., 506), before cited, which decides: "To authorize the court to intervene to remove the lien of an assessment, or to set aside an assessment sale as a cloud on title, it must appear that the record or conveyance is not void upon its face, and that the claimant under it would not develop the defects rendering it invalid by the proof which he would be obliged to produce in proceedings to enforce his claim."

As my judgment is clear that a conveyance of the county treasurer, under the act of 1878, would, without the production of the tax roll imposing the tax, be presumptive evidence of title, I will not fully discuss the point made by the counsel for the plaintiff founded upon section 7 thereof, which provides that upon a sale, the treasurer shall give to the purchaser "a certificate in writing describing the real estate purchased and the sum paid, and such purchaser or his legal representatives or assigns may immediately, upon receiving said certificate, *by virtue thereof and of this act* lawfully possess, hold and enjoy for his and their own proper use, and the use and benefit of his and their heirs and assigns forever, the real estate described in said certificate, unless redeemed as hereinafter provided." It may be proper to say, however, as by virtue of the certificate ("*by virtue thereof, and of this act*" is the language) the buyer would presumptively be entitled to possession, that for that reason also the injunction is granted

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(*Scott agt. Onderdonk*, 14 N. Y., 9; *Marsh agt. City of Brooklyn*, 59 N. Y., 280; *see pages* 284, 285).

An injunction will issue as asked, and the amount of the undertaking will be fixed on the settlement of the order.

SUPREME COURT.

PICKERING CLARK and others agt. THE ST. LOUIS, ALTON AND
TERRE HAUTE RAILROAD COMPANY.

Trust deed — Change of investments — when not allowed — Parties.

Where a deed of trust directs, in plain terms, in what particular securities funds coming into the hands of the trustees shall be invested and how, until so invested, they shall be held, the court cannot, by its judgment, defeat the intentions of the creator of the trust, and the beneficiaries thereunder, by directing different investments.

Without the consent of those beneficially interested in the trust, investments directed to be made in first mortgage securities, cannot be made through the judgment of the court, in those of an inferior lien.

For the purpose of securing such change in investment, the trustees do not represent the beneficiaries, and an action to this end cannot be prosecuted in their names, the beneficiaries not being parties defendant, and having no opportunity to be heard in relation to the propriety of granting such relief.

Special Term, October, 1879.

DEMURREE to complaint.

S. P. Nash, for demurrer.

A. Van Sinderen, opposed.

VAN VORST, J. — The object of this action is to obtain, by judicial sanction, the modification or enlargement of the provisions of the first mortgage or trust deed executed by the St. Louis, Alton and Terre Haute Railroad Company on the 30th day of June, 1862, of its railroad property, to Robert

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Bayard and others, as trustees, and being a lien to secure \$2,200,000 of the bonds of the company known as first mortgage sinking fund bonds.

This first mortgage or trust deed provided for the creation of a sinking fund out of the net earnings of the road, to the amount of \$25,000 per annum, to be paid by the corporation for the redemption of the bonds secured thereby.

The railroad corporation is bound by the terms of the deed to pay this sum in semi-annual payments of \$12,500 each, to the trustees, who are directed to deposit the same in the United States Trust Company, or in some other safe depository in the city of New York, which money, with accumulations of interest, was directed to be invested by the trustees in the purchase of bonds secured by this mortgage, provided the same could be purchased at a rate not exceeding ten per cent above the par of the bonds, with the interest accrued thereon; the deeds contained a further provision that in case the bonds could not be purchased at such rate, then the moneys should remain at interest until the bonds could be purchased therewith at such rates, and that no further payments should be payable to the sinking fund until the money remaining in the said fund, could be used in purchasing the bonds at such rate or under.

The railroad company has regularly, since the year 1864, and down to December, 1878, made its semi-annual payments to the sinking fund, and the same has been invested by the trustees in the purchase of bonds secured by the mortgage, and a sum exceeding \$600,000 has been received and applied by the trustees in the purchase of such bonds.

It appears from the allegations in the complaint, that it has been, for some time past, and is now, impracticable for the trustees to invest the accruing income of the sinking fund in the manner prescribed by the mortgage, in the bonds secured thereby, for the reason that they cannot now be purchased at a price less than fifteen per cent above par, and interest, and that the rate of interest attainable on deposits in the trust

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company or other safe depository does not exceed two per cent per annum. The trustees now ask that their powers be so enlarged as to authorize them, so long as and whenever they shall be unable to purchase the first mortgage bonds at or within the limits prescribed by the trust deed, to invest the money of the sinking fund in the purchase of the preferred second mortgage bonds of the railroad corporation, at a price not exceeding the par of the bonds, with the interest accrued thereon, and to collect the interest thereon, and to add and apply the same to the capital of the sinking fund, to be invested by the trustees in conformity with the provisions of the trust deed as so modified.

I am persuaded that this court has not the power to grant the judgment asked for by the plaintiffs, in the absence of, and without the consent of, all who are interested in, and whose rights were intended to be shielded by, the trust deed.

This court has no power to alter, modify or enlarge the terms of the deed or the powers of the trustees. The terms of the deed are clear and explicit. The duties imposed upon the trustees are imperative. The securities in which the funds are to be invested are plainly stated. The deed when made was such as was intended by the parties and holders of the first mortgage bonds, and others have acquired rights in reliance upon its terms.

Courts may interpret contracts and instruments of doubtful meaning, but when the deed is unambiguous in its language there is no occasion for judicial construction. In all cases the court, by its judgment, gives effect to a writing according to the intention it expresses, and enforces it accordingly. And when a deed of trust directs in plain terms in what particular securities funds coming into the hands of the trustees shall be invested, and how, until so invested, they shall be held, the court cannot, by its judgment, defeat the intentions of the creator of the trust and the beneficiaries thereunder by directing other investments. Without the consent of those beneficially interested, investments directed to be made in first

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mortgage securities should not be made in those of an inferior lien.

For the purpose of securing such change the trustees do not represent the beneficiaries, and an action cannot be prosecuted in their names, the beneficiaries not being parties defendant, and having no opportunity to be heard in relation to the propriety of granting the relief sought.

The trustees, until some legal adjustment be made of the difficulty and embarrassments existing, with those legally and beneficially interested, must execute the trust according to its terms, or until an appropriate action be brought in their names, or to which they are made parties.

There must be judgment for the defendants on the demurrer. No appeal.

COURT OF APPEALS.

EDWARD B. DICKINSON, appellant, agt. WILLIAM Y. EDWARDS,
respondent.

Conflict of Laws — Usury — Contract — by what law governed.

A contract is to be governed by the laws of the place where it is made, if it is not, by its terms, to be performed elsewhere; but if, by its terms, it is to be performed in a state other than that in which it is made, the law of the state in which it is to be performed must govern (*Affirming S. C.*, 13 *Hun.*, 405; *see S. C.*, 53 *How.*, 40).

This is the general rule of construction. The exceptions to it stated.

The case of *Jewell agt. Wright* (30 *N. Y.*, 259) approved, and the cases of *Bowen agt. Bradley* (9 *Abb. Pr. [N. S.]*, 895) and *Wayne County Savings Bank agt. Low* (6 *Abb. N. C.*, 76), disapproved.

October, 1879.

W. R. Beach and G. Norris, for appellant.

F. P. Bellamey and W. S. Parker, for respondent.

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FOLGER, J. — This action is brought against the defendant as the maker of a promissory note. He did write and sign the note and put it in the hands of the payee named in it for their use. This is the form of it :

“\$300.

NEW YORK, *November 14, 1874.*

“Three months after date I promise to pay to the order of Messrs. Bailey & Gilbert three hundred dollars at the New York National Exchange Bank. Value received.”

His defense to the action is, that the note was made by him for the accommodation of the payees named in it ; that it was by him loaned to them without any consideration received by him from them, and that it was transferred by them to the assignor of the plaintiff at a greater rate of discount or interest than that lawful in this state. The facts of the case sustain these allegations of his defense. It is also a fact that he signed the note at the city of his residence and place of business in this state ; that it is dated there ; that it is made payable there ; that it was put in the hands of the payees there. Nor is there any thing to show that the maker knew, or intended or contemplated, that it was to be taken out of this state for its first use.

There is another fact, however, and it is relied upon by the plaintiff to overcome the defense of the defendant. It is that the note first passed into the hands of a holder for a consideration, and thus, as is alleged, had its inception in the state of Massachusetts ; that it was in that state that the discount or interest was taken, greater than that lawful in this state, and that it was lawful in that state to take that rate.

Upon these facts arise the questions of law. In what state was the note made ? and if it was made in the state of Massachusetts, is it not valid everywhere ? It may be granted that the note was made in Massachusetts, and that if the law of the place of execution is to govern that the note is valid and enforceable in this state.

It would seem, at first sight at least, that the latter of these

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questions had been settled in the negative by this court. *Jewell agt. Wright* (30 N. Y., 259) was an action on a promissory note signed by Wright, in this state, to the order of Dunlap, who wrote his name upon the back of it, in this state. The note was, by its terms, payable at a bank in this state. It was put in the hands of Taylor, in this state, for his accommodation, without consideration from him therefor. Taylor took it into the state of Connecticut and got it discounted there at a rate not lawful in this state. It does not appear that Wright or Dunlap knew, or intended or thought, that Taylor would take it out of this state to make the first use of it in Connecticut. Thus the case is the brother of that before us. In one feature of it it is not like — the rate of discount was unlawful in the state in which the note was first used as well as in this state. But as will appear further on, this difference was not material, and the questions of law were the same as those at which we are looking. Judgment went for the plaintiff, the holder of the note, in the courts below, but it was reversed in this court and the case sent back. This court conceded that the law is, that a contract is to be governed by the laws of the place where it is made, if it is not, by its terms, to be performed elsewhere; but held that if, by its terms, it is to be performed in a state other than that in which it is made, the law of the state in which it is, by its terms, to be performed must govern. Just this was determined: That when a note is signed in this state by a resident thereof at his place of business here, bearing date here, a place here fixed in it as the place of payment of it, no rate of interest named in it, no intention of the maker existing that it will be taken elsewhere for discount, it is invalid by the law of this state when it was first negotiated in another state at a rate of discount greater than that allowed by the usury laws of this state; and these are exactly the facts in the case now in hand.

It is said, however, that the case of *Jewell agt. Wright* has been so much questioned by bar and bench as not to be a relia-

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ble precedent. One criticism upon it is, that as the note there was obnoxious to the usury laws of Connecticut as well as of New York, there was no need of the reasoning of the opinion resting the judgment upon the rule that the law of the place of performance must govern, and that, hence, the opinion rendered was *obiter*. This criticism is not well founded. The usury law of Connecticut is not as fatal as that of this state. By the law of that state the contract is not utterly void, but void only as to the whole interest reserved or taken (*Fisher agt. Bidwell*, 27 Conn., 363). So that, though the opinion in *Jewell agt. Wright* starts with saying that the note was negotiated at a rate of interest illegal both in Connecticut and New York, it is correct in further stating the main question in the case to be whether the laws of the former or latter state are to control as to the defense of usury. In the one case the plaintiff would lose only a sum equal to the amount of interest taken or reserved. In the other he would lose the whole amount of the note.

We must say, then, in the case before us, whether we will follow *Jewell agt. Wright* as an authoritative adjudication binding upon us, or whether it is so plainly unsound in its declaration of what is the law, and in its application of it to the facts there shown, as that it should be overruled and the proper rule for a like state of facts be now put forth. The rule declared in that case is, that a personal contract is to be governed by the laws of the country which is named in it as the place for the performance of it. And in stating this as a rule it was conceded that the law of the place, where the contract is made, governs the contract when it is not, by its terms, to be performed elsewhere. This concession might have been made with a limitation, for no state is bound, or ought, to enforce or hold valid in its courts of justice a contract which is injurious to its public rights, offends its morals, contravenes its policy or violates a public law (2 *Kent*, 458; *Varnum agt. Camp*, 1 *Green* [N. J.], 326).

But passing that, this court, in *Jewell agt. Wright*, announced

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not a new principle, or one that is not now prevalent. The general rule is, and has been, that where the contract, either expressly or tacitly, is to be performed in a given country, then the presumed intention of the parties is that it is to be governed by the law of the place of performance as to its validity, nature, obligation and interpretation (*Story on Conflict of Laws*, sec. 280, citing *Andrews agt. Pond*, 13 *Peters*, 65; and 9 *N. Y.*, 53, citing *Holman agt. Johnson*, *Cowp.*, 341).

This rule has been specially applied to the rate of interest to be allowed, and it has been held that where a personal contract is expressly, or by implication, to be paid at a given place, and the rate is not fixed by the parties, interest is to be taken or reserved according to the law of the place where payment is to be made (*Fanning agt. Consequa*, 17 *J. R.*, 511; *Scofield agt. Day*, 20 *J. R.*, 102; *De Wolf agt. Johnson*, 10 *Wheat.*, 367). It is said that such a rule of construction will not be applied if it will render the contract illegal, for that construction will be given to a contract which will render it valid, if it can be reasonably done (*Brown agt. Bradley*, *infra*).

But this remark has no application to the case in *Jewell agt. Wright* or to that before us. There and here no question comes up of the rate of interest to be allowed upon a clause in a contract expressly providing for it, and for the rate of it. There and here the note was silent as to interest, and the rate adopted on the negotiation of it was more than the law of the place of performance allowed. Hence the only indication which the contract gives of the mind of the maker as to the rate of interest is in the phrase which specifies the place of payment, and the indication from that is of a rate lawful at that place.

Nor did *Jewell agt. Wright* go to judgment without reliance upon authority. *Jacks agt. Nichols* (5 *N. Y.*, 178) states, as a ground of the decision in it, that the contract was to be performed in this state (*see page 185*); so *Curtiss agt. Leavitt*

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(15 *N. Y.*, 9, 227) recognizes the rule; and *Cutler agt. Wright* (22 *N. Y.*, 472) is much in point. The note there, made and delivered in New York, reserved, in terms, interest at the rate of eight per cent; but as it was dated and made payable in Florida it was held to be a Florida contract, and not to be governed by the laws of this state on a defense of usury.

It is claimed that *Jewell agt. Wright* has been so seriously questioned as to impair its authority and to throw doubt upon the soundness of the rule it gives out; and that there are adjudications which stand in opposition to it. It is proper to look at the cases which are thought to have that effect.

The most prominent is that of *Tilden agt. Blair* (21 *Wall.*, 241). There are facts in that case which are not in *Jewell agt. Wright* nor in that before us. The action in that case was brought in Illinois, on a draft drawn and dated there by a resident there, at his place of business, and though accepted and made payable in New York by the drawees, residents of New York, it was returned by the acceptors to the drawers in Illinois for the purpose and with the intention, on their part, that it should be negotiated there by him, the understanding being that the draft was to be discounted by a bank in Chicago, and that the drawer should take it up at maturity. Now, the controlling fact in *Tilden agt. Blair*, and so stated to be by the United States supreme court (*see page 247*), is that before the acceptance had any operation, before the instrument became a bill, the acceptors sent it to Illinois for the purpose of having it negotiated in that state; "negotiated," says the court, "it must be presumed, at such a rate of discount as by the law of that state was allowable." The ruling consideration in that case was the intention of the acceptors that the draft should be used in Illinois, as a contract of that state in accordance with its laws; and that the naming of New York city as the place of payment was an incidental circumstance for the convenience of the acceptors, or to help the negotiation, and not as an essential part of the contract, or with the intent to fix a legal consequence to the instrument. There is

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no fact in *Jewell agt. Wright*, nor in the case in hand, to show an intent in the maker of the note to give authority to deal with it otherwise than as the law of this state would allow. Nor was there appearance of authority so to do. He had framed his writing so that it declared that the law of this state was to be the law of its nature and obligation. He made a place in this state the place for the performance of it; and there was naught in the writing, nor in his conduct outside of the writing, which would allow a belief or an inference that he did not mean that part of it to be an essential part of it, and to draw after it a legal consequence. The only authority he gave to the payees was to be found in the fact that the latter by his act had in possession that writing, negotiable by its terms when indorsed by the payee, yet looking to the law of this state for its construction and validity. No one held a right to assume therefrom that the maker's gift of power was greater or other than that.

Another case is *Bank of Georgia agt. Lewin* (45 Barb., 340). It does not refer to *Jewell agt. Wright*, much less question it. Indeed, the opinions in the two cases are from the same judge. The same fact is in it as is in *Tilden agt. Blair*, that it was the purpose of all parties to the draft, when they made and accepted it, that it should be first used in another state than this, wherein it was made payable, and that the place of payment named in it might be inferred to be incidental and not essential.

Bowen agt. Bradley (9 Abb. Pr. [N. S.], 395), decided in a court inferior to that which gave the adjudication in *Jewell agt. Wright*, deliberately disregards it and pronounces it contrary to law, to sound reason and the necessity of commerce. There was room in *Bowen agt. Bradley* for the same reason that controlled the decision in *Tilden agt. Blair*, and the case might well have gone upon the ground that both the maker and indorser of the note knew and meant that it would be first used in Illinois, and in accordance with the laws of that state. But the court chose to put it upon the ground that

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the law is different from what it is declared in *Jewell agt. Wright*. This conclusion is sought to be sustained by reason and authority. It is first declared that this court failed to distinguish between the principles by which the validity of purely personal contracts is to be tested and the rules which have been adopted for the interpretation of them. The court, in *Bowen agt. Bradley*, must then have been of the opinion that the rule that a contract must be governed by the law of the place where it is to be performed is a rule of interpretation, and not one by which to determine the validity of the contract; for, as we have shown, it was that rule upon which *Jewell agt. Wright* went, and we have shown that this rule is operative not only in interpretation, but in an inquiry as to validity, nature and obligation (*Strong on Conf. Laws*, sec. 280, *supra*; *Andrews agt. Pond*, *supra*).

Bowen agt. Bradley then proceeds to state what are the rules of law as to the validity of a purely personal contract. First, that if valid where it is to be made and performed, it is valid everywhere; which may be conceded. Second, if it be made in a state or country where it would be lawful to do all the acts which are agreed by it to be done, but provides that one or more of such acts shall be done in another state or country in violation of its known laws, the courts (at least of the latter) will not enforce the contract. It then proceeds to state rules of interpretation. First, that such contracts are to be construed according to the intention of the parties. Second, that if a different intention is not apparent the intent will be declared to be according to the law of the place of performance, and that thus the law of the place of performance is silently incorporated into the contract, and as an example it is said, if a note payable with interest, without naming the rate, is made or delivered in one state, by its terms payable in another state, the note, by force of the rule of interpretation, is to be paid at the rate of interest of the state where payable. The opinion then holds that such a construction would not be admitted if it would make the note invalid.

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Now a reading of these rules by the side of the facts of the case fails to show an error in the decision in *Jewell agt. Wright*. Surely the place where the contract, there and here, was to be performed was the state of New York ; and surely a note, upon the discount or negotiation of which more than seven per centum per annum was taken without the agreement of the maker, was not a valid contract by the law of this state. Surely the act of payment in that, and in this case, was to be done in this state ; it could not be done without paying more for the loan or forbearance of money than at the rate just named.

That payment was then an act in known violation of the laws of this state, and why then should the courts of this state enforce the doing of that act ?

The contract in *Jewell agt. Wright* and in our case makes apparent no intention of the maker for a greater rate of interest than that lawful in this state. In neither contract is the matter of interest named. Is not then the place of performance named in it the place whose law must be presumed to have been in the intention of the makers as that which should control the rate to be taken ? There can be no pretense that the meaning of the parties was not well expressed in the note in *Jewell agt. Wright* and was not to be fully understood therefrom in respect to the thing to be done and the place where it was to be done. It was to pay a certain sum of money at a bank in the city of Lockport, in this state. But it must be lawful to do that thing there, or the law of this state would not permit it nor would its courts enforce it. It was not lawful there to repay money for the loan of which a greater rate of discount was taken than seven per centum per annum. Plainly the plaintiff in that case sought from the defendant, through the courts of this state, that he do an act which he was forbidden to do by our law. When the assignor of the plaintiff discounted the note, he knew that he took an agreement to do that act in this state, and he was bound to know that it was an act repugnant to the laws thereof (*Cam-*

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broso agt. *Maffett*, 2 Wash., 104); and in legal effect it was the same as if he did know and of intent violated those laws. It is said that there is no violation of the law of this state in the simple act of paying money in solution of a promise to do so, and that as the act of taking a discount at a rate unlawful by our law was not done in this state, no act against its law was done or to be done here. But the act of taking the unlawful discount is not complete until the note has been paid. It rests in agreement until then. When the note has been paid at the place of payment, and the amount gone to the credit of the holder, then is the act first complete and the law is then also violated, and within this state.

It would be a novel and startling doctrine that the usury laws of a state could not be violated by a transaction agreed upon outside its bounds.

Bowen agt. *Bradley* seeks support in the case of *Kentucky* agt. *Bassford* (6 Hill, 526), and the same case is cited on the points of the plaintiff in our case and at the circuit. That case goes, however, upon the expressed ground that whether the bond sued upon was made in Kentucky or New York, the performance of it was to be made in Kentucky, and that in such case the construction and effect of it are the same as if it had been made in that state. Nor does *Hyde* agt. *Goodnow* (3 N. Y., 526) or *Merchants' Bank* agt. *Spalding* (9 N. Y., 53) put forth any rule differing from that in *Jewell* agt. *Wright*.

Neither the discussion in *Bowen* agt. *Bradley* nor the authorities cited there show error in the rule put forth in *Jewell* agt. *Wright*. Citations are made to show that the judge who delivered the opinion in *Jewell* agt. *Wright* joined in decisions claimed to be irreconcilable therewith (45 Barb., *supra*). If there be any weight in that it is neutralized by his later citation of *Jewell* agt. *Wright*, as of prevalent authority (*Hildreth* agt. *Shepard*, 65 Barb., 269). The case of *National Bank* agt. *Morris* (1 Hun, 680), while it doubts *Jewell* agt. *Wright*, does not depart from it. The same reason for the decision existed as in *Tilden* agt. *Blair* (*supra*), while

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the ground upon which it was placed was that found in *Rosa* agt. *Butterfield* (33 N. Y., 665).

Another case is *Wayne County Savings Bank* agt. *Low* (6 Abb. N. C., 76). The opinion in that case does not profess to add much to the reasoning of the court in *Bowen* agt. *Bradley* (*supra*). There is the same assumption that the decision in *Jewell* agt. *Wright* was hasty and ill-considered; an assumption unwarranted in the face of the fact that there was a dissenting opinion read in it, whence it is apparent that both sides of the question were presented, not only upon the argument of the case but upon the consideration and discussion of it by the court. The opinion in 6 *Abbott's N. C.* (*supra*), concedes that where no rate of interest is fixed by the contract the rate is that lawful in the place of performance, but denies that this is the rule in respect to taking usurious interest. We cannot but think that the learned court ignored, what is the conceded general rule, that the place fixed by the contract for the performance of it is an essential part of the agreement, and gives the law which is to determine its validity. A note payable in New York, naming no rate of interest, is discounted in Massachusetts at a rate usurious and unlawful in New York. If the maker pays that note in New York and the holder receives payment there, usury is given and taken, an act is done by them unlawful in New York, *malum prohibitum*, and for which the penalty of a misdemeanor is incurred. It matters not where the contract is made, it is agreed that it be carried out in New York; and thus it is, at the time of the making, agreed that an act shall be done in violation of the law of the place where it is to be done, and then the courts of that place are invoked to enforce the doing of an act which the law of their sovereignty forbids.

We refrain from any consideration of the facts in the case from 6 *Ab.*, for we know not but that it is on its way to us for review. There may be matter in it to distinguish it from *Jewell* agt. *Wright*, and from the case before us.

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In *Providence County Savings Bank agt. Frost* (13 *Nat. Bank Reg.*, 356) the maker of the note himself sent it into the other state for discount there, in accord with its laws, and it is upon that fact that that case went, and the judgment is based upon *Tilden agt. Blair* (*supra*).

The case of *Scudder agt. Union National Bank* (1 *Otto*, 206) does not establish anything contrary to our views. The question there was, what jurisdiction should be sought for the law of the validity of a contract when the validity of it was dependent upon the formalities alone with which it was formed. It was held that the *lex loci contractus* gave the rule, yet it was conceded that the law of the place of performance governed the incidents of payment, including that of the rate of interest when it was not specified. Some things are said in the opinion which, apart from the facts, seem to go further.

These are all the cases brought to our notice in which adverse comment is made or implied upon the decision in *Jewell agt. Wright*. The reasoning of them, in our judgment, fails to touch, or touching does not shake that of the case criticised.

But it is claimed that that case is contrary to the following authoritative adjudications in this state: *Hosford agt. Nichols* (1 *Paige*, 220) holds only that a contract for sale of lands in this state, made in this state, reserving interest at a rate lawful here, silent as to the place of performance, may be performed in fact in another state; and that a mortgage on the same lands, taken there in part payment, reserving the same rate of interest, though an unlawful rate there, will be enforced here.

Chapman agt. Robertson (6 *Paige*, 627) is a case often cited and relied on, but it does not impugn the general rule that the validity of a purely personal contract is to be tried by the law of the place of its performance. The learned chancellor concedes that the case would come clearly under that principle, if the contract in suit had been only the personal contract of the defendant; but he holds that as it was a mortgage actu-

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ally executed here, by a resident here, upon lands here, for moneys loaned to be used here, although to be repaid elsewhere, the law of the state would fix the legality of the rate of interest reserved; and that the further reasons that the contract was partly made here, actually in reference to our laws, with an appeal to our courts contemplated by the parties if necessary.

The opinion in that case has not escaped criticism. "If viewed as the chancellor interpreted the case it is, perhaps, irreconcilable with other cases and with general principles" (*Story on Conflict of Laws*, sec. 293, c). "It appears to me that the case was correctly decided, but * * * upon principles and expositions to which I cannot assent, and which appear to me inconsistent with the general reasoning of the authorities" (*Id.*, note 3; see, also, *Curtiss agt. Leavitt*, 15 *N. Y.*, 88, 228).

Pratt agt. Adams (7 *Paige*, 615, 636) holds, in effect, that a contract for a loan of money may stipulate for a rate of interest lawful where the contract is made, though greater than that where it is to be performed, if it was not a means of evading the usury law of the place of performance. This is not the case before us, nor the case in *Jewell agt. Wright*. The maker of the note in these cases expressed no such stipulation in his contract, nor did he give authority to make it outside of the written contract.

There is nothing in *Cook agt. Litchfield* (9 *N. Y.*, 280), *Hyde agt. Goodnow* (3 *Comst.*, 271), *Lee agt. Selleck* (33 *N. Y.*, 615) which militates with the reasoning or the conclusion in *Jewell agt. Wright*.

Citations are made from the reports of other states and from text-books. With the exception of *Dupau agt. Humphrey* (8 *Mart. [N. S.]*, 1) they make rather for than against the principles stated and founded upon in *Jewell agt. Wright*. Thus, in *Peck agt. Mayo* (14 *Vt.*, 33), it is said that it is an elementary principle that all the incidents pertaining to the validity and construction of contracts will be governed by

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the *lex loci contractus*, which term may indicate where the contract is virtually made according to the intent of the parties, that is, the place of its performance, and that the general rule is, that the latter is the governing law of the contract. That was a case where the inquiry was, what law of interest should determine what damages were recoverable. So in *Pope agt. Nickerson* (3 *Story*, 465) it is said that, in general, the nature, the interpretation and the obligations of contracts are to be governed by the law of the place in which they are to be performed.

Depau agt. Humphreys (*supra*) was cited and approved of by the chancellor in *Chapman agt. Robertson*, but is condemned by *Story* (*See Conflict of Laws, sec. 298 et seq.*).

We find nothing in the citations made to us, nor elsewhere, that shakes the general rule of law of this state that a purely personal contract is to be governed by the law of the place where, by its terms, it is to be performed. We find that some cases have set up exceptions from that general rule. It is not needed that we assent or dissent. None of the exceptions are found in *Jewell agt. Wright*, or in the case before us. We are satisfied that the ground is stable on which the adjudication in that case rests. We follow it as an authoritative precedent and as well decided.

The judgment herein appealed from should be affirmed.

All concur, except RAPALLO and DANFORTH, JJ., dissenting.

NOTE.—The case of *Bowen agt. Bradley*, which is disapproved of in the above opinion, was decided by the superior court of Buffalo; and the case of *The Wayne County Savings Bank agt. Low*, disapproved of in like manner, was decided by the New York common pleas. The case of *Weil agt. Lange* (6 *Daly*, 549) is of like import and may be open to the same criticism.

The tendency of the courts, as indicated by the above decision of the court of appeals, is to put that construction upon the contract as will save it from being destroyed. The general rule being that the place of performance governs, while a contract valid at the place where the money is advanced upon it, is not necessarily to be defeated by the fact that the interest taken was greater than that usually allowed upon such contracts at the place of performance. [REP.]

Becker agt. Sitterly.

MONTGOMERY COUNTY COURT.

HENRY BECKER, appellant, agt. CHRISTIAN SITTERLY,
respondent.

Justice's courts—Jury—irregularities in obtaining, for which judgment will be reversed.

The proceedings by which a jury is to be obtained in a justice's court are purely statutory and should be strictly complied with, otherwise the judgment rendered cannot be sustained.

The justice is limited by the statute to a certain course of proceedings; and unless those proceedings are adhered to, or waived by the party who has a right to insist on them, the judgment is irregular and void.

A *venire* for a jury issued by a justice of the peace to the defendant at his request out of court, and in the absence of the plaintiff and without giving him notice, is irregular, and for such irregularity the judgment will be reversed.

Where it appeared that after the twelve names of the jurors summoned and present had been folded and put into a hat the justice drew out all twelve names at the defendant's request; then he called the twelve names and the jurors all answered, whereupon plaintiff's counsel requested the justice to put all the names back again and draw out six to make the jury, which request the justice refused:

Held, that the refusal of the justice to deposit the twelve names in the hat again and draw out six, *one after another* (as required by the statute), to compose the jury, when requested by plaintiff's counsel so to do, was a fatal error and one for which the judgment will be reversed.

September, 1878.

H. V. Borst, for appellant.

D. S. Morrel, for respondent.

Z. S. WESTBROOK, *County Judge*.—The judgment from which the appeal in this case was taken was rendered in justice's court in favor of the defendant upon the verdict of a jury. There was a disputed question of fact submitted to the jury upon conflicting evidence, and their verdict would be conclusive were the proceedings by which that verdict was obtained regular and valid.

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There are two points raised by the appellant which, I think, are fatal to the judgment and, therefore, it is not necessary to examine any other questions in the case.

The return shows that after the issue had been joined in the action and the cause adjourned to a specified day for trial, the justice issued and delivered to the defendant a *venire* for a jury out of court, and in the absence of the plaintiff, and upon the request of the defendant, returnable on the day of trial. The defendant delivered this *venire* to a constable who summoned a full jury; and they all appeared before the justice at the time appointed for the trial. At the trial, before the jury was called or drawn, the plaintiff's counsel duly objected to the *venire*, on the ground that it was issued to the defendant in the absence of the plaintiff and without giving him notice.

The justice overruled the objection, and allowed the jury to be selected from that panel. This, I think, was error.

The justice should have waited until the plaintiff was in court or had notice of the application before issuing the *venire*.

A *venire* is not issued, or a jury empaneled, in a cause for either party but for both and should be entirely indifferent between them. And the jury should be selected in such a way as will avoid, as near as possible, all opportunity for prejudice or improper influence.

The statute, which is the authority for obtaining a jury in justice's court, provides as follows (2 vol. *Edm. R. S.*, p. 243, sec. 97): "The justice issuing a *venire* shall deliver or cause the same to be delivered to some constable of the county *disinterested between the parties*, and against whom no reasonable objection *shall have been made* by either party."

The intention of the statute is to have an honest and disinterested officer summons the jury and to give either party a right to object to any officer serving the *venire* who is not disinterested or is in any respect an improper officer.

Here the plaintiff has had no opportunity to object to the

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constable. He was selected by the defendant and we cannot presume he would be unfavorable to him.

The only adequate remedy given to a party to prevent an improper officer serving the *venire* is to object to him at the time the *venire* is issued.

The case of *Rice agt. Buchanan* (41 Barb., 147) is directly in point upon this question. That is a general term decision and is decisive of this appeal.

The return also shows that after all twelve names of the jurors summoned and present had been folded and put into a hat the justice drew out all twelve of the names at the defendant's request. Then he called the twelve names and the jurors all answered, whereupon plaintiff's counsel requested the justice to put all the names back in the hat again and draw out six to make the jury. This was objected to by defendant's counsel on the ground that the jury had been drawn. The justice sustained the objection. The counsel for the respective parties then each excused two peremptorily, leaving eight drawn. The plaintiff's counsel then challenged another juror which was objected to by defendant's counsel, and the objection was sustained and the juror allowed to sit. Six of the eight were then sworn by the justice to try the cause. The refusal of the justice to deposit the twelve names in the hat again and draw out six to compose the jury when requested by plaintiff's counsel so to do, I think was also a fatal error.

It was a novel way to select a jury, and entirely unauthorized by any statute or rule of practice.

The statute relating to jurors in justice's courts provides (2 vol. *Edm. R. S.*, p. 243, sec. 99), that at the trial the names returned shall be written upon slips of paper and folded up separately and deposited together in a box or some convenient thing.

And section 100 of the same statute provides :

"The justice shall then draw out six (or such number as the parties may have agreed upon) of such papers *one after*

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another and if any of the persons whose names shall be drawn shall be challenged and set aside *then* such further number shall be drawn as will make up the number required after all legal causes of challenge allowed by the justice. The persons *so drawn* appearing and approved as indifferent shall compose the jury to try the cause."

This plain statute was entirely ignored. The justice is required first to draw six of the names from the box and those six will form the jury, if none are challenged and set aside and if any of the first six are set aside *then* and *then only* is the justice authorized to draw any more, and then *one after another* until the requisite number is selected. It appears there were three jurors that were objectionable to the plaintiff; two were set aside by challenge, one could not be set aside for want of a challenge and was allowed to sit and pass upon the case. If the jury had been drawn as the statute requires, it is not likely all three of the objectionable jurors would have been drawn and no objectionable man would have sat upon the jury.

The proceedings by which a jury is to be obtained in a justice's court are purely statutory and should be strictly complied with, otherwise the judgment rendered on their verdict cannot be sustained (*Brisbane* agt. *McOmber*, 56 *Barb.*, 375).

It cannot be said that the plaintiff has not been injured on account of these errors. It is enough to know the jury decided the case against him and that jury was illegally obtained.

The counsel for the respondent now admits the error of the justice in issuing the *venire* the way he did, but urges that the notice of appeal does not raise the point for review. That position is untenable. The notice of appeal specifies that as a ground of error with all reasonable certainty and that is all that is required.

For the reasons stated the judgment must be reversed. Judgment accordingly reversed, with costs.

Lynch agt. McKenna.

N. Y. COMMON PLEAS.

MARTIN A. J. LYNCH, plaintiff and respondent, agt. BRYAN
McKENNA, defendant and appellant.

Real estate brokerage—liability of purchaser to pay commission—when earned.

The defendant employed the plaintiff, a real estate broker, to purchase two lots for him. The broker conducted the negotiation until the owner finally agreed to accept \$32,000, net, for them. The owner told the broker that he would pay no commission on a sale at that price. The broker communicated these facts to his customer, who said the commission was a small matter and that he would see to it or take care of it. The matter remained in this condition for about one month, when the defendant went personally to the owner and completed the purchase at the net price given by the owner to the broker.

Held, that the purchaser was liable for the brokerage; that, as the defendant had not abandoned the intention of buying the lots, he could not ignore the broker's claim for commission by taking the matter in his own hands and continuing it where the broker left off, and that the broker's compensation was earned when the purchase was definitely agreed upon.

General Term, November, 1879.

THE action was tried in the New York marine court. The trial was by the court without a jury. The facts appear in the head-note and in the following opinion of the trial judge:

McADAM, J. — The decision of this case is rendered difficult by the fact that the parties to the record on both sides and their witnesses appear to be credible and disposed to tell the truth, thus making it hard to say that I disbelieve either. Neither of the parties has willfully sworn false, and yet it is clear that the memory of either the plaintiff or the defendant is sadly at fault.

I have, therefore, diligently considered and weighed the evidence for the purpose of ascertaining, if possible, which

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side is correct in the recollection of the facts. The evidence shows, without material dispute, what in law amounts to an employment of the plaintiff to negotiate for the purchase of certain lots from one Dowdney; that under such employment he called upon Dowdney, and at the defendant's request made an offer of \$28,000 for the lots in question. Dowdney declined the offer, saying that his price was \$36,000 but he would take \$34,000 for them. He finally said he would take \$32,000, net, that is to say, if the plaintiff's customer would pay \$32,000 he (Dowdney) would pay no commission, but that the plaintiff must look to his customer for it. It is also undisputed that the substance of this interview was reported to the defendant by the plaintiff, and that they, too, had some conversation in respect to it. As to what the details of that conversation were the plaintiff and defendant are in conflict. The plaintiff swears that he (defendant) said the commission was a small matter, that he would see to it, or would attend to it, or would take care of it; to let the negotiation rest for a while and do nothing further till he heard from him. The defendant, on the other hand, denies that he ever said a single word to the plaintiff in respect to seeing to the commission, or arranging it or taking care of it.

After this interview the defendant went to Dowdney and closed the contract with him at \$32,000 cash (the price and terms stated by Dowdney to the plaintiff), and upon concluding it Dowdney mentioned Mr. Lynch's name as the broker in the transaction and said he wanted it understood that the price was net and that Lynch must not look to him for commission, whereupon the defendant said to Dowdney: "Never mind about Lynch, he has nothing more to do with the matter."

This evidence of Dowdney demonstrates that Lynch, and not Crimmins (as claimed by the defendant), was regarded as the broker in the transaction.

That Lynch was not to look to Dowdney but to the defendant is inferentially confirmed by the fact that when Dowdney told Lynch that he would not be responsible for any commis-

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sion and that the price, \$32,000, was net, Lynch did not complain, nor did he, in any manner, suggest that Dowdney was the person from whom he expected commissions under any circumstances.

It is, therefore, natural and consequently probable, that Lynch, when he went to the defendant and communicated the terms Dowdney was willing to accept, should have referred to the \$32,000, and to the fact that this price was net and was not to include the commissions, or otherwise we are met by the conclusion that the plaintiff must have been entirely indifferent to the fact, important to most brokers, whether he received any compensation or not.

Subsequent to this the plaintiff saw the defendant and insisted upon a settlement of his claim, and said that, for the sake of peace, he would take fifty dollars, and that the defendant, thereupon, proposed that if Dowdney would pay half he would pay the other half. Dowdney refused to pay any part of the brokerage, as well he might, for he had intimated that determination from the first, and thus the proposed compensation fell through.

The defendant, by his answer, in pleading his reasons for not paying the plaintiff's claim, alleges that the purchase was not made through the plaintiff, as the broker, but through another broker, and the evidence discloses that this person was one John D. Crimmins, a brother in law of Dowdney, who was acting in his interest, but not as a broker, in negotiating the sale. If there was any broker in the transaction the proof is clear that such broker was the plaintiff.

The defendant urges that it is unusual for a purchaser of property to pay brokerage; that, according to the customary mode of transacting such business, he demands and receives his pay from the seller. This is undoubtedly true, as a rule, but where the seller, in the first interview, informs the broker that this rule is not to be enforced against him, that the purchase-price is net, that he will not pay brokerage, and that the broker must look to his purchaser for it, and the broker com-

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municates this fact to his customer, who agrees to see to it, or attend to it, or take care of it (it is immaterial which of these terms was used), the rule is reversed and the vendee, not the vendor, becomes the paymaster.

Upon the whole case, therefore, I am led to believe that the plaintiff's recollection of the transaction accords with the facts, and that the defendant is mistaken in regard thereto. The delay between the time the negotiation was commenced and the time the defendant concluded it in person does not detract from the broker's right to brokerage, because it is evident that the negotiation started by the broker had not fallen through, that the defendant had not abandoned his intention of buying the lots; and after the broker had commenced the negotiations the defendant could not ignore him by taking the matter in his own hands and continuing it where the broker left it off without rendering himself liable to the broker for his reasonable compensation, which was earned when the purchase was definitely agreed upon (*See Morgan agt. Mason*, 4 *E. D. Smith*, 636; *Chilton agt. Butler*, 1 *id.*, 150; *Murray agt. Currie*, 7 *Carr. & Payne*, 584; *Stillman agt. Mitchell*, 2 *Robt.*, 523; *Martin agt. Stillman*, 53 *N. Y.*, 615).

It follows, therefore, that the plaintiff is entitled to judgment for \$320, the amount claimed, with interest and costs.

This judgment was affirmed by the general term of the marine court, and on further appeal was taken to the general term of the court of common pleas for review. That court filed the following opinion:

Turner, Lee & McClure, for appellant.

D. M. Porter, for respondent.

VAN HOESSEN, J. — There is evidence sufficient to sustain every finding of the trial term, and upon those findings there can be no doubt of the correctness of his conclusions of law.

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Were the evidence to be submitted to me as a judge at trial term, I should reach the same conclusion which judge McADAM arrived at. The only room for doubt is as to whether the contract actually made by McKenna and Dowdney was a mere modification of the terms which Lynch was instructed to propose, or whether it was a new and independent contract originated by one or both of the principals after Lynch's negotiations had been dropped and abandoned. Taking all the evidence together I think judge McADAM was right in holding that McKenna merely took up the thread where Lynch, at his suggestion, had for the time left it.

The judgment should be affirmed, with costs.

J. F. DALY, justice, concurred.

SUPREME COURT.

CHAPIN agt. THOMPSON.

Practice — Settlement of case after trial of feigned issues — Appeal from order of settlement — Motion for new trial after verdict on feigned issues — Motion for new trial on case and exceptions after judgment — Code of Procedure, section 1003, quare.

Where, on action brought to foreclose a mortgage of real estate, issues of fact are settled and tried by a jury, and after verdict application is made to the court before whom the trial was had for judgment on "the pleadings, proofs and answers of the jury to the questions submitted," and the trial judge "approved and adopted" the verdict, but made emendations and additions thereto and certified other findings, using in their support the evidence before the jury, to which findings exceptions are filed, it is error in the trial judge to strike from the case the evidence before the jury and the exceptions thereto.

He should, in settling such a case, present, to be inserted, so much of the evidence as was requisite to show the grounds of alleged error, and so much as related to his additions and emendations to the verdict.

The trial judge could not properly limit the review by striking from the case the proceedings had before him, on which the appellant predicates error. It does not lie with him, in settling the case, to hold that the

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grounds of alleged error were untenable, or that they could not be considered by the appellate court.

Such case being in equity the judge was not absolutely bound by the verdict. He could have disregarded it and have made findings in accordance with his own views of the case.

Quere, whether, under the last clause of section 1003 of Code of Civil Procedure, a party in an equity case is not bound by the verdict if he fails, before final judgment, to move to set it aside and for a new trial. The trial judge in an equity case, where the issues are tried before a jury, should hear the motion for new trial on the case made. If he shall decide that such motion cannot be made after judgment, his decision can be reviewed on appeal. (Per BOARDMAN, J.)

Order allowing amendments striking out evidence taken on the trial before the jury reversed, and case and exceptions sent back to the trial judge for resettlement.

Third Department, General Term, September, 1879.

E. M. Holbrook, for appellant.

E. C. James, for respondent.

LEARNED, *P. J.*, BOCKES and BOARDMAN, *JJ.*

BOCKES, *J.*— This is an appeal from an order allowing certain proposed amendments to the case and exceptions made and served by the plaintiff, the effect of which was to strike therefrom the evidence given and the proceedings had on the trial before the jury of the questions submitted, as in the case of a trial of feigned issues under the former equity practice.

A brief review of the proceedings had in this case on bringing it to trial, and subsequently thereto, will show, I think, that the order made by the learned judge was erroneous.

The action was for the foreclosure of a real estate mortgage; but one of the defendants answered. His defense was (1) usury, and (2), in effect, partial payment. Issue being joined the defendant applied at special term for a settlement of issues to be tried by jury, and three questions were framed

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and settled for trial. Those were (1), whether any usurious agreement was made between Thompson and Helmer, the mortgagor and mortgagee; (2), whether Thompson paid and Helmer received any *bonus* in pursuance of such usurious agreement, and (3), whether there was any agreement between Helmer (the assignor of the mortgage) and the plaintiff, in addition to what was expressed in the assignment by the former to the latter; and if there was, then what was such additional agreement?

Thereupon the case came on for trial, on due notice, at the October circuit, 1878, held by Mr. justice TAPPAN. The plaintiff moved the trial of the issues settled as aforesaid, and also for the relief demanded in the complaint against the defendants, who were in default for want of answer.

The issues as settled were taken up and tried by jury. The latter gave a verdict — answering affirmatively as to the first and second questions submitted, and in the negative as to the third. The case was then continued over to a future special term held by the same justice, the respective parties, however, *then* moving, “upon the pleadings, *proofs* and answers of the jury to the questions submitted,” for judgment; the plaintiff insisting upon a judgment of foreclosure in his favor, notwithstanding the verdict; and the defendant asking for judgment in his favor, declaring the bond and mortgage void for usury. No further or other evidence was submitted or offered besides that given on the trial before the jury; and the justice in due time made and filed his findings of fact and law. In and by his findings, he “*approved and adopted*” the verdict of the jury, made emendations and additions to them, and certified other findings, the proof in their support resting in the evidence submitted on the trial before the jury. Thus the trial before the justice was, as the case declares, “upon the pleadings, *proofs* and answers of the jury to those questions submitted; and the findings of the judge, as appears from the papers, was based not alone upon the verdict, but also “*upon the proofs*” taken by and before him.

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Exceptions were duly filed to his findings, and judgment being entered, an appeal was duly taken to the general term.

Now it would seem to follow, according to the well-settled practice of the court, that the appellant was entitled to a case showing the proceedings had before the judge on which the latter had given judgment. Those proceedings would, among other things, include the evidence taken before him, with all exceptions to the admission and rejection of evidence, at least to the extent necessary to disclose fully and fairly the grounds of alleged error.

It seems that in considering and determining the rights of the parties, the judge had before him all the proofs submitted by them during the entire trial, and he based his findings upon those proofs. Judgment was applied for by the parties respectively, "upon the pleadings and proofs and answers of the jury." The case was before the judge for decision on the pleadings, proofs and verdict.

The judge was not absolutely bound by the verdict of the jury, but might have disregarded it if, on examination of the evidence, it had been found to be unsupported by the proof. He could have made findings in accordance with his own view of the case, notwithstanding the verdict (*Brown agt. Clifford*, 7 *Lans.*, 46; *Hatch agt. Peugnet*, 64 *Barb.*, 190). The case being in equity, the verdict was only to satisfy the conscience of the court, and if unreasonable or unjust, in view of the proof submitted, it would be disregarded.

Perhaps, with a view to overcome the effect of the verdict on the questions submitted to the jury, a motion should have been made for a new trial, either on the minutes of the judge or at special term, and this before final judgment (*see last clause of sec. 1003, Code of Proc.*); but this point of objection should not deprive the appellant of his case and exceptions, as made and taken before the judge who tried the cause.

Whatever proceedings were had before the trial judge, touching the alleged errors, the appellant was entitled to have certified to the appellate court. The trial judge could not

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properly limit the review by striking from the case proceedings had before him during the trial on which the appellant predicated error. Whether the alleged error was or was not available to the appellant, was for the appellate court to decide. Now, in this case, the trial judge had before him evidence on which he made emendations and additions to the verdict of the jury. This appears from the findings themselves, and it further appears, too, that such emendations and additions were grounded upon the evidence taken before him on the trial of the issues by the jury. This being so, the appellant was entitled to have this evidence inserted in his case, to the extent necessary, in order to present his grounds of alleged error; and it did not lay with the trial judge, on settling the case and exceptions, to hold that the grounds of alleged error were untenable, or that they could not be considered by the appellate court, and, therefore, to strike from the proposed case the evidence and rulings on which error was predicated. It must be left to the appellate court to determine these questions when the case is brought to a hearing on the appeal. The appellant was entitled to have his case and exceptions duly certified in the record, to the extent of showing the actual proceedings had during the trial, in so far as was necessary truly and fully to present to the appellate court his supposed grievances. Now it may be that by the last clause of section 1003 of the Code of Civil Procedure, the appellant on his appeal will be concluded by the verdict of the jury, inasmuch as no motion for a new trial was made before final judgment was awarded, but that question was not properly one to be considered by the judge on settling the case and exceptions; nor is that question now before us on this appeal. As before suggested, that question is for the appellate court on the hearing of the appeal, when attention can be given it if objection be then raised. Whether or not the appellant must be deemed to have acquiesced in the verdict, because of his omission to move for a new trial before final judgment, must be determined by the appellate court. With

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this the trial judge has no concern. He cannot properly strike out evidence or rulings on the ground that the appellate court cannot or will not consider such evidence or rulings, so be it that they are relevant to the alleged error. In *Ward agt. Marvin* (15 *How.*, 600), and in *Brown agt. Clifford* (7 *Lans.*, 46), the question whether the party should be held to have acquiesced in the verdict, came up on the hearing of the appeal. In so far as the case of *Hegeman agt. Cantwell* (1 *Weekly Dig.*, 450) holds to any different rule of practice from that above indicated, I am unwilling to yield it my concurrence.

At all events, in the case in hand, it appears that the trial judge had before him the evidence given during the trial of the question, submitted to the jury, and made his findings from such evidence. To those findings the appellant filed exceptions. Such evidence and the rulings relating to it should, therefore, be certified in the case and exceptions. Whether the appellant can avail himself of the evidence and rulings to sustain his alleged errors, and whether, admitting that he may do this, he has good ground of complaint against the judgment awarded, are subjects for the consideration of the appellate court.

I am of the opinion that the order appealed from should be reversed, and that the case and exceptions should be sent back for resettlement by the justice who heard and decided the case.

BOARDMAN, J. — I concur, and in addition think the judge should hear the motion for a new trial on the case made. If he shall decide that such motion cannot be made after judgment, his decision can then be reviewed on appeal from the judgment and from the order.

LEARNED, P. J., concurred.

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SUPREME COURT.

BRIDGET WELCH agt. HARLAN D. PRESTON *et al.*

Complaint — Amendment once, of course, without costs — and this after notice of motion by defendant to compel amendment — Code of Civil Procedure, section 542.

Plaintiff served her complaint, and just before time for answering expired the defendant served a notice of motion to strike out certain irrelevant allegations of the complaint and to compel plaintiff to separately state and number the counts of the complaint. Before time to answer had expired, plaintiff served an amended complaint, complying with the requirements of defendant's motion, which defendant refused to receive unless costs of motion were paid, which plaintiff declined to pay:

Held, that, under section 542 of the Code of Procedure, plaintiff should not be required to pay costs of motion.

The words "without prejudice to the proceedings already had" were not designed to compel a party who had committed an error in his pleadings to pay costs of one amendment, and thereby nullify the right which had been secured to him by the statute, of "once amending his pleading, of course, without costs."

Onondaga Special Term, June, 1879.

Plaintiff served her complaint in May, 1879. Just before the time for answering expired, the defendant served a notice of motion to strike out certain irrelevant allegations of the complaint, and to compel plaintiff to separately state and number the counts of the complaint, and on same day obtained an order extending the time to answer, without prejudice, however, to the said motion. Before said extended time expired, plaintiff served an amended complaint, complying with the requirements of defendant's motion.

Defendant declined to receive said amended complaint unless plaintiff paid ten dollars costs of motion, and thereupon proceeded with the motion.

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H. D. Preston cited, for motion, 40 *Howard*, 46; 5 *Howard*, 357; 1 *Code Reports (N. S.)*, 141; 1 *Code Reports (N. S.)*, 21.

E. C. Wright, opposed, cited 13 *Abbott's Practice*, 271; 49 *New York*, 78; 5 *Duer*, 655; 4 *Sandford*, 690; 4 *Sandford*, 699; 21 *Howard*, 333; 12 *Howard*, 80, 81; 9 *Abbott, (N. S.)*, 141; *Tillinghast and Shearman's Practice*, volume 2, page 200; 5 *New York Weekly Digest*, 521.

NOXON, *J.*—The action in this case was brought in the month of May, 1879, by service of summons and complaint. On the 31st day of May, 1879, the defendants, by H. D. Preston, their attorney, served notice of motion upon plaintiff's attorney to strike out as irrelevant certain portions of the complaint, and also that the several causes of action contained in one count be separately stated and numbered, or that all the allegations in plaintiff's complaint, not essential to one cause of action, be stricken out as redundant. That on the 14th June, 1879, the plaintiff amended her complaint and served a copy thereof upon the defendants' attorney. Such service was made in pursuance of the provisions of section 542 of the new Code, allowing the pleading to be once amended, of course, without costs and without prejudice to the proceedings already had. In this case, upon service by plaintiff of the amended complaint, it took the place of the original complaint. This rule is well settled by authority. The language of the statute that "the pleading may be once amended by the party without costs," is plain and explicit. These words are followed by the words "and without prejudice to the proceedings already had." If it be held that the proceedings already had refer to a motion pending at the time of the amendment of the complaint, in which costs are demanded, then the words "without costs" are of no meaning and of no effect when costs of motion are imposed.

Construction has been given in some cases reported, to the

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effect that the words "without prejudice to the proceedings already had" means that the costs of a pending motion to strike out must be paid. But this is not the correct construction of the statute.

It has been held that a motion for judgment on a frivolous answer is remedied by amending the answer to cure the defect, and the motion is no longer pending, it is at an end. So in case of demurrer, an amendment of the pleading has the effect to end all proceedings had on the demurrer without costs.

The words "without prejudice to the proceedings already had," were not designed to compel a party, who had committed an error in his pleadings, to pay costs of one amendment, and thereby nullify the right which had been secured to him by the statute.

The design of the statute was to allow the party to amend his pleading in any case once, without costs, and, at the same time, if any proceedings had already been had by the other party, such proceeding was to be upheld so far only that no prejudice to him should arise. If the amendment was for delay, or the party was to lose the benefit of a term for which the cause had been noticed, the party was not to be prejudiced.

The question of costs of demurrer, or of motion to strike out frivolous pleadings, or of motion to strike out irrelevant or redundant matter, is not alluded to in the proceedings had as being a proceeding in which costs are allowed. And when the amendments are allowed and taken, they are taken, as of course, without costs, and the words "without prejudice" have no reference to costs; these words are to secure to the party such benefit from proceedings in the action he may have taken before the amendment as he was fairly entitled to, and which proceedings, if not allowed the party, might operate to his prejudice, if the words "without prejudice to the proceedings already had," had not been inserted in the section.

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The motion here is not to strike out for irregularity. In some of the cases it is held that the rule sought by the moving party is confined to cases of irregularity, and that costs are only allowed in that class of cases. I do not feel inclined to follow any of the cases that hold that the party amending is, or may be, subject to payment of costs in any form under the statute. His right is secured to him by law to amend once, of course, without costs.

The motion in this case should be denied, and the defendant allowed twenty days, after service of a copy of the order herein, to answer or demur, without costs of motion.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* EDWARD COPPERS and others agt. THE TRUSTEES OF ST. PATRICK'S CATHEDRAL IN THE CITY OF NEW YORK.

EDWARD COPPERS and others agt. THE TRUSTEES OF ST. PATRICK'S CATHEDRAL IN THE CITY OF NEW YORK.

The right of sepulture — How far religious corporations may control and regulate interments in their burial grounds — Rights under contract or conveyance of burial plots — when mandamus the proper remedy.

A religious corporation has full power, when they have parted with no rights by conveyance or contract, to control and regulate interments in the grounds which they hold for that purpose; and if the doctrines of the church of such corporation forbid the burial of the bodies of any other religious persuasion, they may properly, in such cases, exclude those therefrom.

In this case the defendants had entered into a contract or conveyance as follows: "Office of Calvary Cemetery, New York, December 1, 1873. Received from Mr. Denis Coppers, seventy-five dollars, being amount of purchase-money of a plot of ground, eight feet by eight, in Calvary Cemetery. D. Brennan, Superintendent, &c.:"

Held, that, looking at the objects and purposes for which the defendants held and owned the lands known as "Calvary Cemetery," and the lan-

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guage of the instrument, it is reasonably clear that the writing was intended to confer not merely the use of, or easement in, the land, for the purposes of burial, but to convey the ownership of the soil, not for any and every use, but for the sole and only one of burying the dead: *Held*, also, that where the owner of such a plot of ground had died, and his relatives sought to place his body in such plot, it is not in the power of such church corporation, to prevent its deposit therein, upon the ground that the deceased was of another religious persuasion, or for the reason that he was a member of the masonic or any other order.

When vaults or burying lots have been conveyed by religious corporations, rights of property are conferred upon the purchasers. The right is like that to any other real estate, and it is as perfect without sepulture as it is where the grantee has used it for that purpose.

Mandamus may properly issue where a religious corporation refuses or attempts to prevent the burial of a person in a plot of ground, for which he has paid the purchase-price and received a conveyance thereof from such corporation. It properly issues to compel a corporation to do that which, by law, it is required to do, especially when no other adequate remedy exists.

New York Special Term, September, 1879.

Charles W. Brooke, of counsel for Coppers and others.

John E. Develin, T. J. Glover and T. G. Barry, of counsel for the trustees, &c.

WESTBROOK, *J.* — The first of the above entitled matters is a proceeding by *mandamus*, instituted by three brothers, who are the nearest of kin to one Denis Coppers, deceased, with the exception of two minor children of the ages of nine and thirteen years respectively, to compel the interment by the respondents of the body of the said deceased in Calvary cemetery, in a lot purchased by him in his lifetime; and the second is an action brought by such brothers in this court to prevent the removal by the defendants of the body of said Denis Coppers from the receiving vault of said cemetery, except for the purpose of burial, as is sought to be compelled by the first proceeding.

The proceeding was originally instituted against "Calvary

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Cemetery, John Kelly, Hugh Moore and James O'Rourke, trustees and officers of said corporation, exercising the duties and functions of such officers, and being the committee on cemeteries of such corporation, as such officers, trustees and committee," and the action was brought against "Calvary Cemetery," but, by stipulation of counsel and the order of the court, "The Trustees of St. Patrick's Cathedral in the City of New York" were substituted as respondents in the proceeding and as defendants in the action, in lieu and in the place of those first made such. The defendants are a corporation, created by chapter 239 of the Laws of 1817 of this state, and are thereby empowered to hold certain real estate for the purposes mentioned in said act, and, among others, "the said cathedral and burying-place thereto adjoining." By virtue of chapter 87 of the Laws of 1864, the defendants also hold certain lands in the county of Queens for burial purposes, and those lands are known as "Calvary Cemetery."

On the 1st day of December, 1873, the defendants executed and delivered to the said Denis Coppers, who was then living, but is now deceased, an instrument in writing, in the words and figures following, to wit:

OFFICE OF ✠ CALVARY CEMETERY, }
 NEW YORK, *December 1, 1873.* }

Received from Mr. Denis Coppers seventy-five dollars, being amount of purchase-money of a plot of ground, 8 feet by 8 feet, in Calvary cemetery.

\$75.

D. BRENNAN,

Superintendent of Office of Calvary Cemetery.

Section 7.

Plot D.

Range 35.

4 Graves, 5, 6, 7, 8.

Denis Coppers departed this life on the 14th day of August, 1879, at Hoboken, in the state of New Jersey, and, by his last will and testament, directed that his body should "be buried in Calvary cemetery, New York, with or near the remains of my mother, and in the burial lot of ground now

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owned by me there." In such will he further said: "I do hereby declare my wish and desire to be that my funeral services be had and held in some Protestant Episcopal church, and that such services and funeral shall be under the direction, control and management of the Order of Ancient Free and Accepted Masons."

On the 16th day of August, 1879, the undertaker who had charge of the burial, at the request of the relators and plaintiffs, made application at the office of the cemetery to open a grave in the burial plot purchased, as before mentioned, and paid to the parties in such office the sum of seven dollars for the labor of such opening, which money was accepted, and a receipt given therefor. On the succeeding day (August 17, 1879), upon the arrival of the funeral procession with the body of Denis Coppers, the interment in the burial plot and in the grave which had been prepared was refused and forbidden, and permission given to place the same temporarily in the receiving vault of the cemetery, from which its removal and burial elsewhere than in the lot of deceased were threatened, when this proceeding and action were commenced for the objects before stated.

Various objections have been made to both the action and proceeding, founded upon technical grounds, which will be hereafter discussed, but the main proposition involved is this: The defendant is a corporation attached to the Roman Catholic church, and claims the right to exclude and forbid the interment of the body in the lot purchased by Denis Coppers in his lifetime, because such burial would be contrary to the doctrines of such church, which, it is claimed, forbid the burial in consecrated ground of the body of a non-Catholic, or of one who was a member of the masonic fraternity. As the point just stated is the most important one involved, it will be first examined.

It is not doubted that the defendants have full power, when they have parted with no rights by conveyance or contract, to control and regulate interments in the grounds which they

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hold for that purpose; and if the doctrines of the church to which they are attached forbid the burial of the bodies of non-Catholics or of masons, they may properly, in such cases, exclude those therefrom. This authority, when the same has not been surrendered, is not now questioned, but it is claimed by the relators and plaintiffs that the defendants have, by an instrument in writing, parted therewith, having in fact conveyed the fee simple of the land, or at least transferred an absolute and unqualified right, to Denis Coppers, his heirs and assigns, therein for the purposes of burial.

The paper executed to Denis Coppers in his lifetime is certainly not a deed, which of itself would transfer the fee; but as it is duly signed, executed and delivered by an officer of the defendant corporation, whose authority to make a valid instrument of that character is not questioned, and as it declares that seventy-five dollars have been paid as the "purchase-money of a plot of ground eight feet by eight feet, in Calvary cemetery," which plot is, by other words and figures in said writing contained, capable of exact location and ascertainment, and as the deceased, in his lifetime, took actual possession of such plot, by placing therein the remains of members of his family, it is difficult to say why, under the well known maxim of the law that "what has been agreed to be done, and what ought to be done, shall, for the advancement of justice, be regarded as done," it should not be treated as a deed in fee. The acknowledgment, by a writing duly subscribed by the owner, that such owner had received from another person the entire "purchase-money of a plot of ground," which is fully designated, the delivery to, and acceptance by, such buyer of the instrument, and that followed by actual possession of the property, would certainly, in ordinary cases, entitle the purchaser to a conveyance in fee simple absolute, and in any controversy between the vendor and vendee as to the use of the premises, though a formal conveyance had not passed, the latter would, both in law and equity, be deemed the owner. Looking, however, at the

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objects and purposes for which the defendants held and owned the lands known as "Calvary Cemetery," and the language of the instrument, it is reasonably clear that the writing was intended to confer not merely a use of, or easement in, the land, for the purpose of burial, but to convey the ownership of the soil, not for any and every use, but for the sole and only one of burying the dead. If the right intended to be conferred upon the deceased was simply an easement, the paper should so have declared, which it does not do; but, on the contrary, the seventy-five dollars paid is stated to be the full "purchase-money of a plot of ground"—*i. e.*, of the land itself. If, then, the words used are limited by the surroundings, which is lessening their legal significance as much as any known rule of law or equity will admit, the defendants are in the position of parties who have conveyed (for that which they are legally bound to do must be regarded as done) to Denis Coppers, his heirs and assigns, the title of the land, to be used by him and them for the purpose of burying their dead. If a conveyance in that form had been executed, what would have been the rights of the parties? To the answer of this question the discussion will now be directed.

In the *Matter of the Brick Presbyterian Church* (3 *Edward's Ch. Rep.*, 155), the exact question was before the court. The corporation had, many years ago, executed sundry conveyances, and also leases for 999 years of certain pieces of ground in the cemetery belonging to it, for the purpose of constructing vaults to contain dead bodies, and these conveyances were construed "to sell and dispose of the land, and not to grant a mere temporary use or privilege to construct vaults in the land, with a reserve of the title to the church." It was further held to be a "base fee" (*page* 169), because the uses and objects for which it was to be held were limited (*See, also, 4 Bradford, 503, etc., the opinion of Mr. Samuel B. Ruggles*). If one of the owners of ground held for a vault had died, and his relatives had sought to place his body in the vault which he had constructed, would it have

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been in the power of the church corporation to have prevented its deposit therein, upon the ground that the deceased was an Episcopalian and not a Presbyterian, or for the reason that he was a member of the masonic or any other order? Manifestly not, for the corporation had parted with all control over the property, except that which the grant itself provided, or something growing out of the nature and objects thereof. If burial was to be limited to a certain class of persons, the conveyance should so have declared. And what is true and sound in the supposed case is equally so in these under consideration. The defendants are to be regarded as in the position of grantors of a fee of land, to be used and enjoyed, however, by the purchaser, his heirs and assigns, for burial purposes only. If his rights were to be in anywise limited, such limitation should appear in the instrument itself, and not so appearing, no dogma or decree of a church, however right or proper in itself it may be, or however capable of being enforced, if the power and right be properly reserved, can be interposed to prevent the cherished and natural wish of the deceased to have his mortal remains deposited by the side of those of his mother, from being fulfilled.

Nothing inconsistent with the doctrine which has been enunciated was held in *Windt agt. German Reformed Church* (4 *Sandford*, chap. 471). The vice-chancellor, it is true, did decide that mere burial and the payment of charges therefor gave no title to the land, but he also held (*page* 474), "when vaults or burying lots have been conveyed by religious corporations, rights of property are conferred upon the purchasers. This was the case with the corporation of the Brick Presbyterian Church (3 *Edw. Ch. R.*, 155). The right is like that to any other real estate, and it is as perfect without sepulture as it is when the grantee has used it for that purpose."

There is no similarity, it seems to me, between a conveyance of a pew in a church and that of a plot of ground in a

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cemetery, although a supposed one was urged upon the argument. The former conveys an interest in a structure only, and although the building in which the sitting is located is, whilst it stands, a part of the realty, yet no actual land is granted. As the thing itself, of which the right to occupy a part is given, is perishable, that given cannot forever be enjoyed, and on account of that fact, and the necessity of alterations from time to time in the edifice, according to the needs of the occupants, which considerations are obvious to the minds of the contracting parties, there must be certain rights reserved to the corporate body owning the fee, which the law has long recognized and sustained. A deed of a plot of land in a burying ground, however, conveys that which is capable of being held so long as the earth, of which it is a part, shall endure, and hence there can be no rights reserved the reservation of which, though not expressed, is implied in the former instance from the nature of the thing granted. But though the distinction pointed out is unsound, and though the argument of the defendant's counsel endeavoring to maintain the supposed similarity of the two cases be sound, it would still be a novel doctrine to enunciate, that the owner of a church pew, whilst the edifice is still standing and unchanged, could be excluded from its use, because his faith was not entirely in accord with that of the denomination to which the organization occupying the building belonged; and, as it also seems to me, it is even more startling to hold that the body of the human being, whose money, when he or she was living, has purchased a plot of ground for sepulture, can be denied a final resting place therein, for the reason that his or her religious belief was not exactly similar to that of those who conveyed an absolute right of burial without any condition or restraint expressed in the instrument granting it.

It is objected, however, on the part of the defendants that, by their act of incorporation (*chap. 239 of Laws of 1817, sec. 1*), there could be no conveyance of an interest in the

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land without the permission of the court, for it is therein declared "that nothing herein contained shall authorize the said trustees to sell the real estate unto the said cathedral or congregation belonging, without the concurrence of the chancellor, to be first had and obtained in the manner required by the laws." It is, at least, somewhat doubtful whether parties, who have assumed to make and execute an apparently valid contract for the sale of an interest in land, with the unrestored full purchase-price in their pockets, and possession given to the grantee, are in a position to prevent the use of the property in conformity with its manifest object upon such a ground, and whether or not, in the absence of proof, such consent as the law requires will not be presumed (*Bowen and McNamee agt. Trustees of the Irish Presbyterian Congregation in the City of New York*, 6 Bosworth, 245.) Waiving, however, any further discussion of this suggestion, it is apparent that the permission of the chancellor was only required to such sales as would alienate the property from the uses to which it was to be held, and not to such as were designed to carry out the objects and purposes of the original grant to the defendants. By the act of 1864 (*chapter 87*) the lands known as "Calvary Cemetery" are held, and the defendants are empowered to "use" them "for cemetery purposes." The conveyance of family plots for such object is a part, and a substantial part, of the manner in which cemeteries are used by corporations created to hold them, and an approval of each sale for that purpose would be unnecessary, and is not within the purview of the statute. And even though this objection would be valid to prevent a transfer of any ownership of the land, it would not prevent the writing given from conferring a valid right of burial, which right, for all the purposes of the present inquiry, must be ample to afford the relief sought, unless for other reasons, yet to be considered, it must be refused.

It is true, as was urged by the learned counsel for the defendants, that every person who dealt with them was bound

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to know that they formed a corporation attached to the Roman Catholic Church, and that they had power to make lawful by-laws; but, under no rule of law known to me, as has already been intimated, can it be presumed that a party who deals with a corporate body in matters of contract, and pays his money for property, or rights, which it assumes to convey, without restriction, is bound to know of articles of faith or private regulations of the corporate body which will make the purchase valueless and the written grant of no avail. Such a doctrine would unsettle well-established principles, and especially that one which declares that a writing is presumed to contain the entire agreement of the parties. Entertaining this view, it has not been deemed necessary to examine the question whether or not the defendants are justified, by the law of the Roman Catholic Church, in prohibiting the burial of the body of the late Denis Coppers, in the lot purchased by him, upon the ground that he was a non-Catholic or a mason. If the law of that denomination does justify such action, it is held to be inoperative in this instance, by reason of the written contract which has been executed, and, therefore, without discussing the doctrines of the church, some technical objections will next be considered.

It was also strenuously argued that the relators and plaintiffs have no standing to maintain either the action or proceeding, for the reason that they have no title to the burial plot, and are not the next of kin. Are these objections sound? Denis Coppers died on the 14th day of August, 1879. Arrangements were made to open the grave on the sixteenth of the same month, and the funeral was on the seventeenth (Sunday). By his will he had directed the interment of his body (to repeat his own words) "in Calvary cemetery, New York, with or near the remains of my mother, and in the burial lot of ground now owned by me there."

The burial as directed by will was forbidden by the defendants on said seventeenth day of August, but permission to place the body in the receiving vault was given. On the

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next day (August eighteen) the relatives of the deceased received written notice from the person who had signed the original receipt for the purchase-money of the lot, "that the remains of the late Denis Coppers cannot be kept in receiving vault for more than three days; if not removed at the expiration of that time, they will be interred in the unconsecrated ground." The children of the deceased were infants, the one of the age of nine years and the other of the age of thirteen years. The will of Denis Coppers was not admitted to probate until the 25th of August, 1879. When it became necessary, then, to initiate this suit and proceeding, and when they were in fact commenced, there were no executors qualified to act, and no children of sufficiently mature years to determine what should be done. Under such circumstances the three brothers (and the deceased left no other brothers or sisters, nor father or mother) commenced both the proceeding and action to protect the remains and to compel a burial in the spot which the deceased had himself selected. Is the law so inhuman as to declare that these brothers, who are the nearest of kin to the deceased, who are of the age of discretion, have no standing in court to effect their pious and loving intent? No attempt will be made to dispute the proposition of the learned counsel for the defendants, that the relators and plaintiffs are not "the next of kin," for as the deceased left children they could not be; but the admission of that proposition does not admit the conclusion for which they contend. As the next of kin of full age, the plaintiffs and relators, in view of the helplessness and infancy of the children of the dead brother, owed to that stricken family the moral duty at least, and, perhaps, the legal one, of superintending the burial of the remains. If that duty was not one which the law would compel, it will at least respect when it is voluntarily assumed and it will not close the doors of its courts to those who are seeking to have that done which humanity warmly commends. The defendants do not represent the owners of the plot or (if title has not passed) those

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who control the burials therein. He who paid during life for the right has directed his burial in the spot he purchased, and to prevent the execution of that direction the defendants cannot say the owners of the property are not before the court, nor can they successfully urge that the brothers of the deceased, under the peculiar circumstances of the case which makes their intervention proper, if not necessary, are so far divested of all duties and rights in the premises as to be powerless to invoke judicial action. The law recognizes in many cases rights and remedies springing from the necessity of a given case, and when brothers of a deceased person seek to protect his remains from maltreatment or insult, when they are the only persons in a situation to intervene, the law ought not inhumanely to say that they are intruders, having no standing in court for such a purpose, and decline to give a right or remedy which is oftentimes given and created upon the ground of necessity for less humane and meritorious objects.

But the plaintiffs and relators have also a standing in court based upon a contract with the respondents and defendants. It was the money of the former which the latter received for the opening of the grave. That agreement remains unfulfilled and the price paid for the labor is unreturned. If the relief asked upon these motions is granted, the contract made will only be enforced against those who have promised performance, and in favor of those to whom the promise was given. Upon this ground, also, as well as upon that based upon kinship to the deceased, and the necessities of the case, it is held that judicial action is properly invoked by those who seek it.

It is also argued that a *mandamus* is not the proper remedy. It is conceded that the cases are not uniform as to when the writ issues. Numerous decisions, however, can be found in which it has been held to properly issue to compel a corporation to do that which, by law, it is required to do, especially when no other adequate remedy exists. If we are right in

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our view that the defendants should be deemed to be in the position of grantors of the cemetery plot to be owned by the grantee, his heirs and assigns, for burying their dead, then, as they have also received compensation for opening the grave, they are bound so to do. The need of burial is a pressing one, and there seems to be no other remedy which is adequate to the emergency. If, however, the court has jurisdiction of the subject-matter and of the parties, objections founded upon the form of the proceeding have never been favorably regarded by me. Writs were originally devised by courts to redress peculiar grievances, and the power which could create can enlarge the original office, provided the jurisdiction of the court over the subject-matter and of the persons is not exceeded.

A careful examination of the questions which have been submitted leads me to the conclusion that the respondents must open the grave, for doing which they have received payment, and against them, as defendants in this action, an injunction must issue as prayed for. Such injunction is granted for the reason that as the defendants prevented the interment of the body in the spot to which it was entitled to be interred, and gave permission for its deposit in the vault, they cannot remove the same elsewhere for burial.

The order will be settled on notice, so as to preserve the status of parties pending an appeal, if the defendants elect so to do.

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SUPREME COURT.

ROBERT J. ANDERSON agt. HENRY J. SPEERS.

Action against trustee of manufacturing company — Complaint — Separate causes of action.

In an action brought by a creditor of a manufacturing corporation against a trustee for a liability imposed by the fifteenth section of the act of 1848 for the filing of a false report, the complaint should show that the debt, for which the defendant is sought to be made liable, was contracted while he was a trustee.

Where the complaint alleged that the defendant was, on the 18th day of January, 1877, and "*before that date*," a trustee:

Held, not to be an averment that he was such trustee, in the year 1876, when the debt was alleged to be contracted.

The filing of a false report on successive years gives rise to a separate cause of action as to each year.

The allegations in one cause of action cannot be supplemented by those in another and separate cause in the same complaint, unless they are connected therewith by appropriate statements.

Victory Webb, &c., Company agt. Beecher (55 How. P. R., 193) applied.

DEMURRER to complaint.

Special Term, October, 1879.

Michael H. Cordozo, for demurrer.

W. W. Niles, opposed.

VAN VORST, J. — This action is brought against the defendant, as a trustee of a manufacturing corporation organized under the act of 1848, to enforce liabilities incurred under the fifteenth and twenty-third sections of that act. Three separate causes of action are relied upon.

The first arises under section 15 and is for an alleged filing of a false report on the 13th of December, 1877. But this

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cause of action is defective in not stating that the debt, for which the defendant is sought to be made liable, was contracted while he was a trustee. It is stated in the complaint in this connection that the defendant was, on the 13th day of January, 1877, and "before that date," and subsequent thereto, one of the trustees of the corporation. But that is not a statement that the defendant was a trustee in the year 1876, when the debt is alleged to have been contracted. If the defendant was a trustee a day previous to the 13th of January, 1877, that would satisfy the statement that he was a trustee before that day.

The second cause of action grows out of the filing of a false report on the 13th January, 1878. The complaint terms this breach of the statute, as it undoubtedly is, "a further and other cause of action."

Each act of the character of the one of which complaint is made, affords the creditor a right of action against the trustee in fault.

The creditor on the trial may fail, as to the act complained of, as being committed in January, 1877, and may succeed as to the one alleged to have been done in January, 1878.

But the second cause of action is defective, for the reasons above stated, with respect to the first cause; and, further, in that it omits to set up a debt against the corporation in favor of the plaintiff.

In the first cause of action an indebtedness in favor of the plaintiff against the corporation is fully set up; but the second cause of action cannot be supported by the allegations in the first, as it contains no statements drawing to itself the statements of the first upon this subject (*Moak's Van Santvoord's Pleadings* [3d edition], 149).

The third cause of action arises under the twenty-third section, and from the fact, as is alleged, that the indebtedness of the company exceeded the amount of its capital stock.

In disclosing his last cause of action the pleader states that the defendant, during all the time between the 15th day of

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January, 1876, and the 18th day of January, 1878, was one of the trustees of the company. Had such statement been made in the first cause of action it would have been complete. But such allegation, made with respect to the last cause of action, cannot be used to uphold the first in the absence of language connecting the same therewith.

Authority is clearly against supplementing the allegations of one cause of action by statements made in another not distinctly connected therewith by appropriate words. Justice LAWRENCE had this subject lately before him, in the *Victory Webb, &c., Manufacturing Company* agt. *Beecher* (55 How. P. R., 193), and in a carefully considered opinion, which I approve, he so held (*See, also, Simmons* agt. *Fairchild*, 42 Barb., 404). The learned counsel for the plaintiff, on the argument of the demurrer, contended that there was in fact but one cause of action set up in the complaint, and that what are claimed by the defendant's counsel to be several causes of action are, in reality, several liabilities for the same cause.

I cannot accept this conclusion. The liabilities imposed by the statute upon the trustees for the making of false reports and allowing the indebtedness to exceed the capital stock are, in their nature, penal (*Jones* agt. *Barlow*, 6 *Jones & Spencer*, 142; *Niles* agt. *Suydam*, 64 N. Y., 173). Each act enters into and becomes a separate cause or ground of action.

It is true that there could be but one recovery for the debt existing in the plaintiff's favor against the corporation; but such recovery would be justified by proof of either of the acts done or suffered by the trustees, that is, for filing a false report in 1877 or 1878, or suffering an increase of the indebtedness above the capital stock of the corporation.

There should be judgment for the defendant on the demurrer, with liberty to the plaintiff to amend on payment.

Wilde agt. Wilde *et al.*

SUPREME COURT.

JAMES L. WILDE, as executor, &c., agt. MARY WILDE *et al.**Will—construction of—Interest on legacies, when and from what time allowed.*

Testator gave a daughter a legacy of \$5,000 and a brother a legacy of \$3,000. He further directed his executor to invest a sum sufficient to pay his widow during her life, \$200 per annum, and another sum sufficient to pay a son \$100 per annum, during life. He then gave the *residue* of his estate to the daughter to whom he had given the \$5,000 except the *principal* of the two sums invested to pay the annuities to his son and widow, "which I direct to go to my heirs-at-law." The executor invested sums sufficient to produce the annuities when there was not sufficient to pay the \$5,000 legacy to the daughter, and that of \$3,000 to the brother, in full :

- Held*, 1. That on the death of the widow and the son, the principal of the sums invested to produce these annuities should be applied to the payment of the balances unpaid on the \$5,000 and the \$3,000 legacies.
2. That such legatees were entitled to interest upon the unpaid balances of their legacies, commencing one year after the granting of letters testamentary.

Montgomery Circuit, October, 1879.

THE testator died in 1859 leaving his will in which he first gave to his executors, in trust and with power of sale, his farm and also his farm stock and implements, with direction to sell them, except two cows and household furniture which he bequeathed to his wife.

He gave to his wife \$200 per year during her lifetime, and to his son Amos \$100 per year during his lifetime. He directed that a sum of money sufficient to produce said annuities at seven per cent per annum be invested.

He bequeathed to his brother, Perry Yates, \$2,000 to be paid to him "as soon as convenient after my decease," and to his daughter, Mary Wilde, \$5,000, to be paid to her "as soon as convenient after my decease."

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Lastly, he gave the residue of his estate to Mary Wilde, except the principal of the above legacies, with respect to which he uses these words, "which I direct to go to my heirs at law."

The plaintiff, as executor named in the will after probate thereof and letters testamentary, took upon himself the administration. He sold the real and personal estate, converted the same into money, and invested \$2,857.34 to raise the annuity for the widow and \$1,428.66 for the son. He paid Perry Yates upon account of his legacy \$1,277.81 and to Mary Wilde upon account of her legacy \$3,192.52. He has now about \$300 in his hands other than the principal of said annuities. The testator's widow died March 29, 1878. His children, Amos and Mary Wilde, are the testator's only heirs-at-law. The question is, whether his children take the principal of the widow's annuity, as the legatees under the bequest thereof to them, or as heirs at law of the testator, as if he were intestate as to that sum, or whether that principal is a fund from which the unpaid balance of the legacies bequeathed to Perry Yates and Mary Wilde is to be paid, or whether it is to be applied pro rata among the several legatees, Perry Yates and Mary Wilde, so named in the will, or Mary Wilde and Amos Yates the persons forming the class to whom, as "heirs at law," the same was bequeathed.

S. P. Heath, for plaintiff.

N. C. Moak, for defendant Mary Wilde.

Smyth & Nellis, for defendant Amos Yates.

Winegar & Heath, for administrators of Perry Yates.

LONDON, J. — The intent of the testator, so far as it can be gathered from the whole will, must afford the key to the construction.

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By the previous provisions of his will he had made exact bequests to his wife, his brother and his two children. To make the provision for his wife and son he had provided that a sum large enough to yield the income he bequeathed to them should be taken from the bulk of his estate and invested. No doubt he supposed that his estate was ample to provide every dollar which he bequeathed in exact sums to the persons he named, and that there then would remain a residue to consist of two parts, one part a balance, larger or smaller, remaining after his executor had paid the legacies to his brother and daughter, and had invested the principal to raise the annuity for his widow and son, and the other part that very principal from which the annuities must be raised. His mind devoted the balance to his daughter as a still further "token of his affection." That balance, to his mind, would be payable immediately.

He could not tell when the other part of that residue namely, the principal sum to be set aside, would be payable.

His widow must die before one part of it could be payable, and his son before the other.

His daughter might die long before either. It was improbable that he could name anybody then to be alive, and so he named his "heirs at law."

Still searching for his intent, suppose it had been asked him, in case of an insufficiency of funds to pay in full both the legatees, whom he called by name, and the "heirs at law," whom he could not name, which of them should be paid in full, can there be any doubt that he would have preferred the former to the latter—the known to the unknown? This view of the testator's intent leads to the result that the principal sum now available by the death of the widow forms part of the estate of the testator from which the legacies which were given Perry Yates and Mary Wilde should be paid.

It is interesting to notice that these legacies were directed to be paid "as soon as convenient." Of course the testator

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did not anticipate the shrinkage in his estate which has occurred, and this long postponement of payment. It may safely be affirmed, however, that he never contemplated such a contingency as that they should not be paid when it should become convenient.

The foregoing construction finds support in the case of *Arnold* agt. *Arnold* (2 *My. & Keene*, 374), a case cited with approval in 2 *Roper on Legacies* (1510, 1511), and in *Williams on Executors* (6 *Am. ed.*, 1462.)

If, after paying the unpaid balance of these legacies in full, with interest, any balance remains, it should be paid to the heirs at law.

With respect to the interest, the general rule is, that it begins to run from the date when the legacy becomes due. This is fixed by statute at one year from the granting of letters testamentary, unless the same is directed by the will to be sooner paid (2 *R. S.*, 90, *sec.* 43). In this case it seems to be peculiarly just that the interest should be paid. There were not enough assets to enable the executor to set aside the principal from which to raise the annuities, and also pay the brother and daughter the legacies bequeathed to them.

The executor, with the approval of the surrogate, provided, without abatement, the principal fund for the annuities, thus compelling the brother and daughter to wait for a portion of their legacies until now. Had the deficiency been apportioned *pro rata*, the annuities must have been abated to some extent, and the brother and daughter, as legatees of exact sums, would have received large payments. If they are allowed interest upon what they have so long waited to receive, amends will be made for the apparent injustice done them, and the scheme of the testator will be as nearly accomplished as circumstances will permit.

Graves agt. Cameron.

N. Y. COMMON PLEAS.

ELIZA J. GRAVES, plaintiff and respondent, agt. ALEXANDER CAMERON, defendant and appellant.

Landlord and tenant — Foreign laws — Abandonment of premises demised.

At common law, the abandonment of untenable premises constituted no defense to the tenant in an action by the landlord for the rent.

Where the demised premises are situated in another state, the law of that state governs the rights and liabilities of the parties, and, in the absence of a plea and proof by the defendant of some statute of the other state changing the common law rule, the courts of this state must presume that the common law governing the matter is in force in such state.

An entirely new defense cannot be interposed at the trial by way of amendment, and a refusal by the trial justice to permit the tenant to amend upon the trial, by pleading the foreign statute, was not error.

General Term, November, 1879.

THE action, which was commenced in the New York marine court, was brought to recover five months' rent of premises on Pavonia avenue, Jersey City Heights. The defendant defended upon the ground that he abandoned the premises before the rent claimed became due, on account of their untenability. The action was tried before Mr. justice McADAM, who held that the premises, being in New Jersey, the rights and obligations of the parties were to be construed with reference to the common law, which was presumably in force there, and that, by the common law, a tenant took premises for better or worse, and could not defend upon the ground that they had become untenable. That, if there was a statute in New Jersey modifying this rule, it ought to have been pleaded and proved. The defendant offered to amend upon the trial by pleading, and then proving the New Jersey statute. This the trial judge refused, upon the ground that a new substantive defense could not be introduced at the trial by amendment.

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A question of surrender and acceptance having been submitted to the jury, and decided adversely to the defendant, judgment was entered in favor of the plaintiff for the amount claimed. The defendant thereupon appealed. The marine court, general term, affirmed the trial judge, and the matter was brought into the common pleas for review.

Becker & Carter, for appellants.

A. B. Malcomson, for respondent.

VAN HOESSEN, *J.*—The defendant hired a house in New Jersey, which he abandoned before the expiration of the term, and he attempts to justify his action under the act of the legislature of the state of New York, known as chapter 345 of the Laws of 1860.

He does not actually assert that the laws of the state of New York govern leases or property situated in New Jersey, but he insists that as there was no proof as to what the law of New Jersey is, we must assume that the legislature of that state has followed the lead of the state of New York in so changing the common law as to permit tenants to abandon tenements which have become untenable. In *McCulloch* agt. *Norwood* (58 *N. Y.*, 567), the court of appeals said in reference to the proposition that the statute law of another state must be presumed to be the same as the statute law of New York, "it is difficult to find any reason upon which such a rule can rest, and when the question is distinctly presented we regard it as still open to examination." Until the court of appeals shall announce a contrary doctrine, we must be governed by the decision of this court in *Waldron* agt. *Ritchings* (3 *Daly*, 288), which is in accord with a long line of adjudications in the supreme court (*Wright* agt. *Delafeld*, 23 *Barb.*, 498; *White* agt. *Knapp*, 47 *Barb.*, 549; *Pomero* agt. *Ainsworth*, 22 *Barb.*, 129; *Holmes* agt. *Boughton*, 10 *Wend.*, 75; *Stokes* agt. *Macken*, 62 *Barb.*, 145).

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In the case of *Waldron agt. Ritchings*, chief justice DALY said that the common law was presumed to prevail in every state of the Union until the contrary was shown.

At common law, the abandonment of the premises by the tenant would have been no defense to an action against him for the stipulated rent.

The justice at the trial term was unquestionably right in his ruling. There is nothing in the exception to the refusal of the justice to permit the defendant to amend his answer at the trial, by setting up as a defense the existence of a New Jersey statute which authorizes a tenant to abandon demised premises on their becoming untenable. As the justice said, it would be permitting the defendant to set up a new substantive defense.

It is unnecessary to cite authorities to prove that proposition, or that an entirely new defense cannot be interposed, by way of amendment, at the trial.

The judgment should be affirmed, with costs.

DALY, Ch. J., and J. F. DALY, justice, concurred.

N. Y. SUPERIOR COURT.

A. EMILIUS OUTERBRIDGE and JOHN S. SCOTT, plaintiffs, agt.
ROYAL PHELPS, defendant.

Right of way — rule of law as to — Easement.

Where the owner of two or more tenements sells one of them, or the owners of an entire estate sells a portion, the purchaser takes the tenement or the portion sold, with all the benefits which appear at the time of the sale to belong to it, as between it and the property which the vendor retains.

But no burden or servitude can be imposed by the vendor upon the tenement or portion sold, in favor of the property retained by him in derogation of his grant, without a reservation expressed in the grant,

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unless an apparent sign of servitude exists on the part of the tenement or portion sold, in favor of the property retained and the easement claimed is *strictly necessary* to the enjoyment of the property retained. In the latter case visibility and strict necessity must both concur, as in the case of a party wall, and especially in the case of a claim of right of way.

The right of way from necessity over the lands of another is always of *strict necessity*, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That the way through his own land is too steep or too narrow, does not alter the case. It is only where there is no way through his own land that the right of way can exist. That a person claiming a way of necessity has already one way, is a good plea and bars the plaintiff.

Special Term, December, 1879.

MOTION for the continuance of an injunction restraining the defendant from cutting off a right of way claimed by the plaintiffs through the door and hallways of the building No. 29 Broadway, in the city of New York, and from tearing down or removing from the front of said building the signs of the plaintiffs.

Sutherland & Scott, attorneys, and *Francis M. Scott*, of counsel, for plaintiffs.

Lord, Day & Lord, attorneys, and *George De Forest Lord*, of counsel, for defendant.

FREEDMAN, J. — The case, as made by the papers submitted on both sides, involves no controversy as to the material facts. They are as follows, viz. :

The building fronting on Broadway, known as No. 29 Broadway and now owned by the defendant, was built first as a separate building. The next, immediately in the rear of the first, which, in the motion papers, is sometimes styled the "rear building" and sometimes the "extension building," was erected afterwards fronting upon Morris street and filling up the

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whole space in the rear of the original building lying between the latter and the side walls of two dwellings adjoining on the west, and fronting and opening upon Morris street as their only outlet. More than twenty-five years ago all four of these buildings were used together as a boarding-house. While they were so used the front building had staircases of its own in the rear of the hallway, over and through which the plaintiffs claim a right of way. There was an opening in the west end of the hallway into the so-called rear or extension building; and the main and customary entrance to all parts of the four buildings, while occupied and used together as stated, was through the door and hallway of the building fronting on Broadway. But there were also staircases in said rear or extension building connecting the upper floors with the ground floor, from which, through doors still in existence, access could be, and I have no doubt, as occasion required was had to Morris street; and there were other independent entrances from Morris street which also still exist, and by which access could be, and was, had into the two most westerly buildings, and through them to all parts of the four connected buildings. The staircases by which access was thus had to and from Morris street, through the two most westerly buildings, are still standing, but are included in and covered by lettings to tenants of the present owner.

From the intersection of Broadway and Morris street the grade of Morris street, towards the west, is descending, so that the first or ground floor of the building fronting on Broadway was, and is, on a level with the second floors of the extension building and the two most westerly buildings fronting on Morris street; and the ground or first floors of the buildings last referred to were, and are, on a level with the basement of the Broadway building. The premises with these four buildings thereon were next leased and occupied by the firm of Spofford & Tileston, who kept open the communication which existed between the front and rear building, and used the rooms in the front building for

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their general office, and rooms in the rear parts for a record room, porters' room, water closets, coal bins, &c.

In 1863, while the premises were thus used and occupied by said firm, Paul N. Spofford became the owner of them, subject to two mortgages upon the whole, amounting in the aggregate to the sum of \$50,000. These mortgages have been assigned to, and are now held by, the Mutual Life Insurance Company. From the time Spofford became the owner, he rented out offices in the buildings to tenants for business purposes.

A short time before May, 1865, Spofford made extensive alterations in the premises, for the purpose of rendering the whole of the premises suitable and available for business purposes, and put them in the condition in which they still are. Among other things, not necessary to be specially mentioned, he widened the front hall on the first floor of the front building, and continued the passageway thus widened straight to the extreme westerly end of the four buildings; and he also removed the staircase in the front building, and constructed one in the east end of the so-called rear or extension building, by which access was provided to each floor of the four buildings. From that time forward the entrances on and from Morris street ceased to be used, and the tenants of the offices in the so-called rear building were obliged, and of necessity permitted, to pass in and through the door and hallway of the building fronting and facing upon Broadway, and the tenants of the upper parts of the Broadway building were obliged, and of necessity permitted, to pass up and down the staircases erected in the rear or extension building, and all tenants, no matter in what part of the connected buildings their offices were situated, were permitted to display, and keep upon the front of the Broadway building, signs indicating their names and the character of their business. On the ground floor of the rear or extension building, situate between the building fronting on Broadway and the two most westerly buildings, there are four small shops, which face and open on Morris street, and they were

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deprived of the communication that formerly existed between the ground floor and the upper part of said building.

In January, 1873, the Mutual Life Insurance Company, in consideration of \$25,000 paid on its mortgages, released the entire front or Broadway building to Spofford, by an instrument containing no reservations, and about the same time Spofford mortgaged the premises so released to William Albert and Charles Hickman, as executors of the estate of Richard Adams, deceased, to secure a loan of \$50,000. This mortgage contained no reservations, and was recorded February 6, 1873.

After the mortgage last referred to had been made and recorded, the plaintiffs hired from Spofford, and went into the occupation of, two rooms on the *second* floor of the so-called rear or extension building, and since 1874, their said occupation has been continued under successive annual leases. Their present holding is under a verbal letting for one year from May 1, 1879, upon the terms expressed in a previous written lease, which, however, as is admitted, contained no allusion to either a right of way through the hallway in question, or to a right to affix signs upon the Broadway front.

Spofford remained in possession of the four buildings connected as aforesaid, until December, 1878, when the premises fronting on Broadway were sold under a judgment for the foreclosure of the Albert and Hickman mortgage, and purchased by the defendant in good faith, and without knowledge of plaintiffs' claims, for the sum of \$58,000. The remaining three buildings, lying and fronting upon Morris street, west of the defendant's building, Spofford retained, and they are still owned by him.

Upon ascertaining, after his bid had been accepted, the condition and use of the premises, and fearing that some right of way might be claimed by Spofford or his tenants, the defendant applied to the supreme court, which had given the judgment of foreclosure, to be relieved from his purchase. At the same time the plaintiff in the action applied to the

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same court for an order directing the defendant to complete his purchase. The plaintiff gave notice of his application to all the parties who had appeared in the suit, but did not serve the papers on Spofford, who had not appeared. Spofford, however, seems to have had actual notice of both applications. They were heard together, and both decided against the defendant, and the latter thereupon completed his purchase as he was directed to do, and paid the price bid, and received his deed.

It was not until after the defendant had thus completed his purchase, that Spofford first claimed that a right of way through the Broadway building existed; and when, after due notice to Spofford and his tenants, including these plaintiffs, the defendant, having erected new staircases inside of his building, and desiring to utilize part of the hallway to increase the size of the main offices in his building, proceeded to close up the opening in his rear wall, he was stopped by the temporary injunction in this case.

The present action is not brought by Spofford, but by the plaintiffs as tenants of Spofford. They show that they are shipping and commission merchants, transacting business at the offices occupied by them as the agents of a steamship company, known as the "Quebec and Gulf Ports Steamship Company," and running numerous steamers from this port to ports in the West Indies and other places; that frequently more than 100 persons call at their said offices in the course of a single day to transact business with them, and that free and convenient access to their place of business is a matter of the greatest importance to them. They also allege that Broadway is the principal business street and thoroughfare in the city of New York; that all the important steamship companies transacting business in this city have their offices either on Broadway or the Bowling Green, and that the offices occupied by them are valuable to them only because of the entrance thereto from Broadway. They therefore claim that by virtue of their hiring they are entitled to a right of way

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through the hall of the Broadway building, and to the right to affix and maintain their signs upon the Broadway front, and that the defendant cannot deprive them thereof; and they show by the affidavit of Spofford that the latter intended to and did give them these rights as far as he could do so.

If these rights exist in favor of the plaintiffs, whose lease is subsequent to the record of the mortgage through which defendant's title comes, and subsequent also to the filing of the *lis pendens* in the foreclosure suit, they must exist to the same extent in favor of every tenant occupying a room, no matter how small, in any one of the three buildings which Spofford retains, and not only in favor of every such tenant now in possession, but also in favor of every one who may come in under future leases; and thus the Broadway building must remain forever subject to the burden which thus rests upon it and materially affects its rental and salable value. For if the rights claimed exist at all, they must exist as easements which are attached to and follow the land, not the person of Spofford, and as such follow parts of the estate into the hands of the respective tenants.

The general rule, undoubtedly is, that where an easement is secured to a dominant estate and is designed to benefit the same, in whosoever hands it may be, it will inure to the benefit of the owners of the several parts into which it may be divided, provided the burden upon the servient estate is not thereby enhanced.

At the outset it is important to observe, however, that there being, as was conceded, no right by prescription, the rights claimed must rest in a reservation in some form or way to Spofford at the time of his making the mortgage to Albert and Hickman in 1873. For since the execution of that mortgage as a conveyance to secure the payment of the sum named therein, Spofford could convey no rights to the plaintiffs but what were subject to the estate created by that instrument.

It is conceded that the mortgage in question conveyed the premises fronting on Broadway by metes and bounds in fee,

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subject only to the conditions of the mortgage, and that it contained no reservation either of a right of way, or of any other right in favor of any of the other premises retained by Spofford; and, as a general principle, no reservation is implied in a grant, it would seem to follow that the rights now claimed are not well founded.

Thus, in *Burragt. Mills* (21 *Wend.*, 290), where a man had conveyed without reservation part of a tract of land which was at the time flowed by a mill-dam belonging to him, and had retained the other part on the stream below, it was held that his right to continue to flow the land conveyed was gone. COWEN, J., states the principle as follows: "After having sold the land absolutely, Nathaniel Burr, the testator, had no right of flowing left which he could devise to his four grandchildren. It can make no difference that there was then a dam built which flowed this land. If a man convey land which is covered by his mill-pond without any reservation, he loses his right to flow it. There is no room for implied reservation. A man makes a lane across one farm to another, which he is accustomed to use as a way; he then conveys the former without reserving the right of way; it is clearly gone. A man cannot, after he has absolutely conveyed away his land, still retain the use of it for any purpose, without an express reservation. The flowing or the way are but modes of use, and a grantor might as well claim to plough and crop his land. If the mill had been first sold by Nathaniel Burr to another, it would have been different; for the right of flow would have passed to that other as an incident, and could not then be cut off by the grantor."

The plaintiffs rely, however, upon the principle enunciated by SELDEN, J., in delivering the opinion of the court of appeals, in *Lampman agt. Mills* (21 *N. Y.*, 505), and upon other reported cases which it is claimed establish a rule similar to that stated in the case first mentioned. Judge SELDEN says: "The owner of real estate has, during his ownership, entire dominion and control over its various natural

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qualities, and may dispose of and arrange them at will. He may alter the natural distribution of those qualities, so as essentially to change the relative value of the different parts, and may, in a great variety of ways, make one portion of the premises subservient to another. * * * The rule of the common law on this subject is well settled. The principle is, that where the owner of two tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement, or portion sold, with all the benefits and burdens which appear, at the time of the sale, to belong to it, as between it and the property which the vendor retains. This is one of the recognized modes by which an easement or servitude is created. No easement exists so long as there is a unity of ownership, because the owner of the whole may, at any time, rearrange the qualities of the several parts. But the moment a severance occurs by the sale of a part, the right of the owner to redistribute the properties of the respective proportions ceases, and easements or servitudes are created corresponding to the benefits and burdens mutually existing at the time of the sale. This is not a rule for the benefit of purchasers only, but is entirely reciprocal. Hence, if, instead of a benefit conferred, a burden has been imposed upon the portion sold, the purchaser, provided the marks of this burden are open and visible, takes the property with the servitude upon it. The parties are presumed to contract in reference to the condition of the property at the time of the sale, and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts."

In that case a certain water-course had been diverted into an artificial channel, thereby freeing from water land which, *in that condition*, was sold to the plaintiff, and upon which he had built a barn, and it was held that neither the vendor, nor his subsequent grantee of the remaining portion, could close the artificial channel, and thereby again flood plaintiff's land. It was a case, therefore, where the implication of the

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imposition of a servitude was sustained not in favor of the grantor, but of the grantee, and hence it is evident that the proposition that a similar implication arises in favor of a grantor and against a grantee, was not involved in the decision of the case so as to become conclusive authority, and that judge SELDEN did not intend thereby that it should be applied to all cases which by possibility might be brought within its broad language. In another part of the opinion he had himself stated the question before him to be as follows: "The precise question in this case is, whether an owner who, by such an artificial arrangement of the material properties of his estate, has added to the advantages and enhanced the value of one portion, can, after selling that portion with those advantages openly and visibly attached, voluntarily break up the arrangement, and thus destroy or materially diminish the value of the portion sold."

But I am not left to mere inference as to whether the proposition so broadly stated in favor of general reciprocity was *obiter* or not, for in the later case of *Butterworth agt. Crawford* (46 *N. Y. R.*, 349), in which it was sought to enforce that very doctrine under circumstances which brought it directly before the court, the decision of the case was carefully placed upon a different point, and the court expressly announced that it did not propose to decide the question.

I am, therefore, at liberty to consider the question now before me as one which is open in this state, and which must be dealt with upon principle rather than upon authority.

In the examination of the doctrine as stated, in both its aspects, by judge SELDEN, in *Lampman agt. Milks*, with a view of disposing of it upon principle, the first point which challenges attention is, that the two converse propositions are very unequally supported. So far as it implies an easement in favor of the grantee, it stands upon solid ground, viz.: that no man can derogate from his own grant, and that justice requires that the grant should be construed against the grantor, so far as to pass the privilege affixed by himself to

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the property conveyed. So far as it implies an easement in favor of the grantor, these reasons fail, and others must be resorted to. But I cannot see what others there can be, except strict necessity.

True, *Gale & Whately on Easements*, claim that the maxim that no man can derogate from his own grant, though insufficient to account for, is, nevertheless, consistent with the principle that the obligation is imposed equally on the grantee and grantor. But the value of their statement as an authority must, of course, depend upon, and be measured by, the number and the weight of the cases which support it.

The numerous cases cited, in which the dominant tenement was first conveyed, and the implication enforced in favor of the grantee, and all cases in which the conveyance of both dominant and servient tenements was simultaneous, or the title to both vested simultaneously by operation of law, as, for instance, by descent cast, may, therefore, be at once dismissed.

This leaves for special consideration *Nicholas agt. Chamberlain* (Cro. Jac., 121), *Pyer agt. Carter* (1 *Hurlstone & Norman*, 916), *Davies agt. Sear* (7 *Law Rep.*, [*Eq. Cas.*], 427), *Suffield agt. Brown* (9 *Jur.* [*N. S.*], 999), and *Hazard agt. Robinson* (3 *Mason*, 272).

In *Nicholas agt. Chamberlain*, it was held, upon demurrer, "that if one erect a house, and build a conduit thereto, in another part of his land, and convey water by pipes to the house, and afterwards sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduits and pipes pass with the house, because *it is necessary and quasi appendant* thereto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new, as the case may require."

Davies agt. Sear was a case of way by necessity. The house conveyed contained an arch, through which a paved passageway ran to land and a stable in the rear. The case turned not only on the state and condition of the property,

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but also the notice which the defendant had at the time of the purchase, and it was held that though the archway to which he took subject, may not then have been a way of necessity, yet being obviously designed to be one, and bound to become one, and actually becoming one on the completion of a plan for the erection of other buildings in the immediate vicinity, and then in process of erection, a right of way was reserved by implication.

Hazard agt. Robinson was a case of water-courses, where a right had also survived from a prior user.

In *Pyer agt. Carter*, the defendant's house adjoined that of the plaintiff, and the action was for stopping a drain running under both houses. The two houses had formerly been one, and were converted into two by a former owner, who conveyed one to the defendant and afterwards the other to the plaintiff. At the time of the conveyances the drain existed and was in use for both houses, running first under that of the plaintiff, next under that of the defendant, and then discharging itself into the common sewer. It was proved that the plaintiff might have a drain direct from his house into the common sewer, and it was not proved that the defendant, at the time of his purchase, knew of the position of the drain. It was laid down by the court that where the owner of two or more adjoining houses conveys one to a purchaser, such purchaser will be entitled to all the benefit of all the drains from the house, and subject to all the drains "*necessarily used*" for the enjoyment of the adjoining house, and that, too, without any express reservation or grant, inasmuch as the purchaser takes the house "as it is," and that the question as to what is necessarily used depends upon the state of things at the time of the conveyance, and as matters then stood, without alteration. WATSON, B., said: "We think that the amount to be expended in the alteration of the drainage, or in the constructing of a new system of drainage, is not to be taken into consideration, for the meaning of the word 'necessity,' in the cases above cited, and in *Pinnington agt. Galland*

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(9 *Exch.*, 1), is to be understood the necessity at the time of the conveyance, and as matters then stood without alteration, &c., &c.”

This case has been much discussed and criticised, and in *Washburn on Easements* (2d ed., p. 68), the learned author, after reviewing the cases on this subject states that he considers the doctrine of *Pyer agt. Carter*, confined to cases where a drain is necessary to both houses, and the owner makes a common drain for both, and this arrangement is apparent and obvious to an observer. In *Butterworth agt. Crawford* (46 *N. Y.*, 349), RAPALLO, J., in delivering the unanimous opinion of the court of appeals, approves of the conclusion reached by professor Washburn and adds: “If *Pyer agt. Carter* goes further than that, or at all events, if it applies to cases where there is no apparent mark or sign of the drain, it is not in accordance with the current of the authorities.”

In *Suffield agt. Brown* (9 *Jur.* [*N. S.*], 999), the owner of a dock adjoining a wharf, claimed as an easement that the bowsprits of vessels in the dock might project over the wharf. The master of the rolls had granted an injunction on the ground that the wharf and the dock had been once owned, and so used together, by the common grantor of both parties.

But lord chancellor WESTERBURY in 1864 (10 *Jur.* [*N. S.*], 111), reversed the decree declaring the law on this branch of the case in the following language:

“Assuming that the vendor had been in the habit, during his joint occupation of both properties, of making the coal wharf subservient in any way to the purposes of the dock, one would suppose that the right to do so was cut off and released by the necessary operation of an unqualified sale and conveyance of the subservient property. It seems to be more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut

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down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties) by the fiction of an implied reservation."

In the course of his opinion the learned lord chancellor declares that *Pyer agt. Carter* is not good law so far as it seems to establish an implied reservation against a man's own grant, and he also repudiates the doctrine asserted by *Gale & Whately*, viz.: that the obligation is imposed equally on the grantee and the grantor, and that it is immaterial which of the two tenements is first granted, whether it be the quasi-dominant or quasi-servient tenement, in the following language: "But I cannot agree that the grantor can derogate from his own absolute grant, so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of the grantor."

Thus *Suffield agt. Brown*, as finally decided by the lord chancellor, is in perfect harmony with *Burr agt. Mills* (41 *Wend.*, 292), already referred to and consistent with the point actually decided in *Lampman agt. Milks* (21 *N. Y.*, 505); and although subsequently, in *Davies agt. Sear* (7 *L. Rep. [Eq. Cas.]*, 427), the same master of the rolls (lord ROMILLY) who had originally granted the injunction in *Suffield agt. Brown*, repeated the assertion that it is immaterial whether the dominant or the servient tenement is conveyed first; it is evident that his assertions cannot override the direct decision of the lord chancellor, his superior, which remains unreversed. Besides, as already shown, *Davies agt. Sear* went upon the question of the way being a way of necessity.

The next point to be considered is, that all easements and servitudes do not stand upon the same footing.

In *Lampman agt. Milks* (*supra*), SELDEN, J., says: "It is not every species of easement which passes, as a matter of course, by the conveyance of one of two tenements, or part of a single tenement, by the owner of both or the whole. Easements or servitudes are divided by the civil code of

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France into continuous and discontinuous. Continuous are defined to be those of which the enjoyment is, or may be, continual, without the necessity of any actual interference by man, as a water spout, or right to light or air. Discontinuous are those, the enjoyment of which can be had only by the interference of man, as rights of way, or a right to draw water.

“Servitudes are also divided by the same code into ‘apparent’ and ‘non-apparent.’ The analogy between the common law and the French code, in this respect, would seem to indicate, as suggested by Messrs. Gale & Whately, a common origin. The substance of those divisions may be distinctly traced in the common law cases; and it will be found that those easements, which, according to this classification, are termed *discontinuous*, pass upon a severance of tenements by the owner only when they are *absolutely necessary* to the enjoyment of the property conveyed. Gale & Whately, after stating the grounds upon which easements are held to pass in such cases, say: ‘This reasoning applies to those easements only which are attended by some alteration, which is, in its nature, *obvious and permanent*; or, in technical language, to those easements only which are apparent and continuous; understanding, by apparent signs, not those which must *necessarily* be seen, but those which may be seen or known, on a careful inspection by a person ordinarily conversant with the subject.’” (*Gale & Whately on Easements*, p. 40.)

Of course, a right of way may, in an exceptional case, especially if indicated by an artificial structure of a permanent character, constitute an apparent and continuous easement. But, as a general rule, rights of way are in their nature discontinuous and non-apparent, unless strictly and obviously necessary, and the distinction between rights of way and other easements which, from their nature, may be deemed necessary is therefore recognized by many cases, including *Lampman agt. Milks*.

For these reasons, and the further one that a right of way

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arises only from the effect of the grant or reservation of the land itself, provided there is no other way of access to the same, it has always been held, and the law seems to be now settled beyond controversy, that, in the language of the court in *McDonald agt. Lindall*: "The right of way from necessity over the land of another is always of *strict necessity*, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That the way through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land that the right of way over another can exist. That a person claiming a way of necessity has already one way, is a good plea and bars the plaintiff" (*McDonald agt. Lindall*, 3 *Rawle*, 492; *Stuyvesant agt. Woodruff*, 1 *Zabriskie*, 118; *Filters agt. Humphreys*, 3 *C. E. Green*, 280). Or, as stated by another class of cases, a right of way exists only where the person claiming it has no other means of passing from his estate into the public street or road (*Gayetty agt. Bethune*, 14 *Mass.*, 49; *Grant agt. Chase*, 17 *Mass.*, 443; *Smyles agt. Hastings*, 22 *N. Y.*, 217; *Collins agt. Prentice*, 15 *Conn.*, 39; *Hyde agt. Jamaica*, 27 *Vt.*, 443).

Nor would the rights of a grantor be any more extensive or different, though by the terms of his deed he reserved to himself "a way of necessity." *Viall agt. Carpenter* (14 *Gray*, 126), and *Washburn on Easements*, shows by quite an array of authorities, that the right of way of necessity is so limited in respect to its duration, that though it remains appurtenant to the land in favor of which it is raised, so long as the owner thereof has no other mode of access, yet, the moment the owner of such a way acquires, by purchase of other land or otherwise, a way of access from a highway over his own land to the land to which the way belongs, the way of necessity is at an end; or, in other words, a way of necessity ceases as soon as the necessity ceases.

From the examination so far made, which includes many

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cases which I do not deem it necessary to mention specifically, I am satisfied that the true rule of law is as follows: Where the owner of two or more tenements sells one of them, or the owner of an entire estate sells a portion, the purchaser takes the tenement or portion sold, with all the benefits which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. But no burden or servitude can be imposed by the vendor upon the tenement or portion sold, in favor of the property retained by him in derogation of his grant, without a reservation expressed in the grant, unless an apparent sign of servitude exists on the part of the tenement or portion sold in favor of the property retained, and the easement claimed is strictly necessary to the enjoyment of the property retained. In the latter case, visibility and strict necessity must both concur, as in the case of a party wall, and especially in the case of a claim of right of way.

The rule being as stated, the plaintiffs cannot succeed upon this motion. Not only was there no reservation, but it also clearly appears, and on their own showing, that access can be had to the buildings retained by Spofford, and through them to their offices from Morris street; and also that at a comparatively small expense additional, direct and perfectly abundant communication between said street and their offices can be established, by the construction of an interior staircase from the ground floor to the second floor of the building in which the said offices are situated. In view of these facts, the right of way claimed did not spring into life upon the severance of Spofford's property in favor of the property retained by him, and the plaintiffs can claim no such right.

The element of necessity being wanting it is not enough that, as claimed by the plaintiffs, apparent signs of servitude existed at the time of the execution of the Albert and Hickman mortgage. Nor is it necessary to determine whether such signs as did exist really constituted apparent signs of servitude within the rule laid down by the authorities, or were

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just as insufficient to create an apparent easement as the gate was held to be in *Stuyvesant agt. Woodruff* (1 *Zabriskie*, 133), or the carriageway in *Pheysey agt. Vicary* (16 *M. & W.*, 484), or the alleyway in *Felters agt. Humphreys* (3 *C. E. Green* [*N. J.*], 260).

The right claimed to affix and maintain signs upon the Broadway front of defendant's building, if not still more indefensible, stands upon the same footing as the right of way claimed, even when considered as an independent right and not merely as one which is incidental as a guide to an existing right of way. If it survived a severance it would, as tenants would move into or out of the buildings retained by Spofford, necessitate a periodical putting up and taking down of signs of various forms, sizes and appearances, and, consequently, involve often-recurring changes in the appearance of the front itself. This the law would permit, even in case of a general reservation, only upon proof that the burden upon the servient estate was not increased thereby beyond the extent reserved; and in the absence of a reservation it can be sustained only upon proof of strict necessity as well as visibility. But I cannot see how, in a case like the present, it can be said that the existence of the right claimed is necessary to the enjoyment of the demised premises. The plaintiffs' tenement is bounded by its four walls, and though for the transaction of their business therein it may be more advantageous, or even necessary, that the premises occupied by them should appear to be Broadway property, yet such a requirement on the part of their business does not, in any legal or proper sense, constitute a necessity for the proper enjoyment of the premises. Matters necessary for the proper enjoyment of demised premises, and matters necessary for the profitable transaction of a certain business therein, are altogether different things. Between landlord and tenant no contract or warranty on the part of the landlord that the premises demised shall be or continue fit for the tenant's business, is ever implied from the mere fact of letting. None can, therefore, be implied against

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Spofford from the mere fact that he rented to the plaintiffs the offices occupied by them. How, then, can such an implication arise against the defendant whose position is still stronger? If the plaintiffs stand so much in need of premises fit for the purposes of business usually transacted on Broadway, they should be left to secure them directly.

Upon the whole case, therefore, it clearly appears that the plaintiffs, as tenants whose rights are in all respects subsequent and subject to those acquired by the defendant under the sale of foreclosure, possess no right of easement, or any other right, sufficient to maintain the action against the defendant, and that if Spofford expressly contracted but failed to give them any such right, their remedy is against Spofford, personally. Having reached that conclusion, in the course of the examination already made, it is unnecessary to consider the further point pressed and argued with great ability on the part of the defendant, that the question involved in this motion is *res adjudicata* between the parties by reason of the decision of the supreme court by which the defendant was compelled to complete his purchase.

The motion of the plaintiffs for the continuance of the injunction should be denied and the preliminary injunction dissolved, with ten dollars costs.

COURT OF APPEALS.

ARTHUR A. BROWN, plaintiff and respondent, agt. HORACE K. THURBER *et al.*, defendants and appellants.

Written agreement — when may be controverted or varied by parol evidence.

The rule that when an agreement between parties is reduced to writing, it cannot be controverted or varied by parol evidence, applies only to parties to the agreement. But when persons not parties to the agreement, and in no way connected therewith, are interested like judgment creditors, for

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example, to show what the agreement was, they may resort to parol evidence to show what the real transaction in fact was, notwithstanding the writing.

Decided May 20, 1879.

APPEAL from New York common pleas.

Nelson Smith, for appellants.

Benjamin Estes, for respondent.

PER CURIAM. — It is needful only that we should state briefly our reasons for the reversal of the judgment appealed from.

1. At the time the ale was delivered to Healy he gave the following receipt, dated May 1, 1872, and signed by him : "Received from the Long Island Brewery, No. 83, &c. (to remain the property of A. A. Brown until paid for), eighteen casks of ale — stock." Healy was a retail liquor dealer in the city of New York. The defendants obtained judgment against Healy, and levied upon and sold so much of this ale as Healy had not sold at retail. The plaintiff claiming that he had only stored the ale with Healy, and that he had not paid for it, commenced this action for the conversion thereof. It became important, therefore, for the defendants to show, if they could, that the ale was actually sold upon credit to Healy and not stored with him, or that it was delivered to him to be retailed and paid for after thus sold. As bearing upon these points, defendants' counsel asked plaintiff, upon cross-examination, this question : "State to me, if you know, what Healy said to you when he called at your brewery in Brooklyn, just prior to the 1st of May, 1872, in reference to these particular ales."

Plaintiff's counsel objected to this question, "on the ground that the agreement was in writing, and that is the best evidence ;" and the court sustained the objection. In this there

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was error. It is clear, from the ruling and other proceedings upon the trial, that the court tried the case upon the theory that the receipt embodied the agreement between the plaintiff and Healy, and was the only evidence and conclusive evidence thereof. The rule that when an agreement between parties is reduced to writing it cannot be controverted or varied by parol evidence, applies only to parties to the agreement. But when persons not parties to the agreement, and in no way connected therewith like these defendants, are interested to show what the agreement was, they may resort to parol evidence to show what the real transaction in fact was. This error was in no way cured by other evidence given.

2. While defendants were thus prohibited from showing what the real transaction was, the plaintiff, against the objection of the defendants, was permitted to show that he kept a storage book; that these ales were entered therein, and that his storage book was a simple memorandum book for keeping an account of ale stored. These entries were no part of the *res gestæ*. They were simply the declarations of the plaintiff in his own favor, and the proof was not competent against these defendants.

The judgment of the common pleas must be reversed, and the order of the general term of the marine court must be affirmed, and judgment absolute given for the defendant, * with costs.

EARL, FOLGER, RAPALLO and ANDREWS, JJ., concur
MILLER, J., reads for affirmance, and with CHURCH, Ch. J.,
and DANFORTH, J., dissent.

* The portion of the decision making the judgment absolute, was, upon motion, changed to an award of a new trial. [Rep.]

Woodmansee and Garside agt. Rodgers.

SUPREME COURT.

LUMAN WOODMANSEE and ABRAHAM GARSIDE agt. AMOS S.
RODGERS.

Attachment—vacating of, by subsequent attaching creditor—Code of Civil Procedure, section 682—A mere levy not an actual application of attached property under this section—Insufficiency of affidavit to warrant attachment.

A mere levy is not an actual application of the attached property to the payment of the judgment, under section 682 of the Code of Civil Procedure, so as to prevent a subsequent attaching creditor from applying to vacate the same as provided in this section.

Special Term, December, 1879.

ON the twentieth October last Luman Woodmansee and Abraham Garside, creditors of Amos S. Rodgers, obtained a warrant of attachment from judge DONOHUE, in the supreme court, against the property of the debtor on the following affidavit:

CITY AND COUNTY OF NEW YORK, ss.:

Abraham Garside, being duly sworn, deposes and says that he is one of the plaintiffs in the above entitled action, and a member of the firm of Woodmansee & Garside, doing business in the city and county of New York; that the above named defendant is indebted to deponent's firm in the sum of \$793.39 for goods sold and delivered by deponent's firm to said defendant at divers times between the first day of June, 1879, and the last day of October, 1879, and that deponent's firm has commenced an action against said defendant as appears by the summons hereto annexed. Deponent further says that on the 20th day of October, 1879, one Thomas R. Miller, doing business in the city of New York, and one of the creditors of the above named defendant, called on depo-

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nent and informed deponent that the above named defendant was unable to pay deponent's firm in full, and offered deponent twenty-five cents on the dollar, and, at the same time, informed deponent that if deponent's firm would not accept said compromise that he (the said defendant) would make an assignment of all his property, and at the same time handed to deponent a composition agreement in accordance with the above proposition, to which was annexed the signature of said Miller; and deponent further says, that the said defendant is about to make an assignment with intent to defraud deponent's firm, and his other creditors, as deponent verily believes. Deponent further says, that the said defendant is indebted to deponent's firm in the amount as heretofore set forth over and above all counter-claims to this deponent known.

ABRAHAM GARSIDE.

Sworn to before me this 20th }
day of October, 1879. }

ELI M. COHEN,
Notary Public, N. Y. Co.

The warrant was issued to the sheriff, who levied upon the property of the defendant thereunder; the plaintiffs subsequently obtained judgment in the action and issued execution thereon. In the meantime and before the entry of the judgment, Weil Brothers, also creditors of Rodgers, obtained an attachment against his property, and before the same had been sold by the sheriff, a motion was made in their behalf to vacate the attachment of Woodmansee & Garside, upon the affidavit upon which the same was granted. This motion was made under section 682 of the Code, and was argued before judge BRADY, who vacated the attachment of Woodmansee & Garside, rendering the following opinion:

Otto Horwitz, for plaintiffs.

Blumensteil & Hirsch, for Weil Brothers.

Lockman agt. Ellis.

BRADY, J.—The attachment granted in this action cannot be sustained. The affidavit is deficient in facts to warrant it, and the motion made by the subsequent attaching creditor to vacate it must be granted. The Code, section 682, provides for such a proceeding by a person acquiring a lien upon the attached property at any time before the actual application of the attached property or the proceeds thereof to the payment of the judgment recovered in the action, and consequently a levy under an execution is not sufficient to defeat it. A levy is not an actual application of the property to the payment of the judgment. Before there can be an application, such as is contemplated, there must be a sale under the levy where the property seized is not money or its equivalent in fact, such as a bond of the United States or other security having a fixed monetary value. Actual means real, not formal, and involves a finality. For these reasons the motion is granted, but without costs.

SUPREME COURT.

LOCKMAN agt. ELLIS and others.

Extra allowance — when not granted.

Where, after an action of foreclosure was at issue and had been noticed for trial, the defendant tendered the amount of the mortgage, interest and costs, a statement of which had been rendered by the plaintiff's attorney and the tender being accepted, it is too late thereafter to apply for an extra allowance. Had the tender been conditionally received it might be otherwise.

New York Fire and Marine Insurance Company agt. Brownell (9 How. Prac. R., 898) distinguished.

Special Term, December, 1879.

VAN VORST, J.—This is an action for the foreclosure of a mortgage; an answer was interposed and the cause noticed for

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trial. The case was on the calendar for several terms, but its trial was postponed for various reasons. Finally one of the defendants, the owner of the mortgaged premises, called upon the plaintiff's attorney and asked for a statement of the plaintiff's claim, and stated that he was prepared to pay up the mortgage; he asked for the amount of the plaintiff's mortgage, and interest and costs to date.

The plaintiff's attorney prepared such statement, which included the costs of the action, amounting to \$153.65. This amount the defendant tendered to the plaintiff's attorney, with the charges for satisfying the mortgage. The tender was accepted and a satisfaction-piece was delivered.

The plaintiff's attorney now asks for an extra allowance, in addition to the costs which have been received. I think the application comes too late. The plaintiff's attorney alleges in his affidavit, that by the settlement it was left to be thereafter determined as to whether the plaintiff was or not entitled to an allowance in this action.

But this is denied by the defendants' attorney, who swears "that the tender was for the full amount of their statement of principal, interest and costs in full to date of tender."

There has been no judgment in the action, and none can now be obtained in the plaintiff's favor as the mortgage is satisfied of record.

In the case of *New York Fire and Marine Insurance Company agt. Brownell and others* (9 *Howard Prac.*, 398) the tender appears to have been declined and the proceedings went to judgment, and the court held that, notwithstanding the defendant had tendered the amount of the mortgage and costs, the plaintiff was not bound to accept it, and made an allowance in addition. But that is not this case.

It may be that the tender might have been accepted conditionally, leaving the plaintiff's right to an allowance in addition to costs to be thereafter determined. But it does not appear that such matter was left, through the understanding of both parties, open.

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The plaintiff's claim upon the mortgage is gone and there is nothing left, it appears to me, of a real nature upon which the court can act in granting an allowance.

The motion for the allowance is denied, without costs, and an order may be made, as asked for, that the action be discontinued as to all the defendants, without costs to them, or either of them.

I do not think the defendant Ellis, upon the facts appearing, is entitled to costs.

SUPREME COURT.

ROBERT H. BERDELL, plaintiff and appellant, agt. HARRIET B. BERDELL and ELIZA W. PARKHURST, defendants and respondents.

Husband and wife — Action maintainable by husband against his wife for conversion of his property.

A husband may maintain an action against his wife for taking and converting his property.

Second Department, General Term, November, 1879.

THE facts sufficiently appear in the opinion.

W. J. Groo, for appellant.

S. W. Fullerton, for respondents.

BARNARD, P. J. — The plaintiff, at the time of taking the property in question, was the husband of the defendant Harriet B. Berdell. She left her husband's house and took with her therefrom certain personal property of very considerable value. The plaintiff brought this action to recover its

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value against six persons. The action failed as to four, by consent of the plaintiff, upon the trial. The court dismissed the complaint as to the defendant Parkhurst, because there was no proof making out a cause of action against her; and as to the defendant Berdell, because the action would not lie against the wife for the wrongful taking. As to Mrs. Parkhurst, I think the ruling was right. She made no claim to the property; she did not direct the taking, or assist in its removal, directly or indirectly. The entire proof against her was that she was an inmate of the family up to the time of the removal, and continued with the wife afterwards. She asserted a claim against the plaintiff upon her own account, the particulars of which do not appear. She went with Mrs. Berdell upon one occasion to consult with her attorneys about her claim, at the same time that Mrs. Berdell consulted the same attorneys about the property in question. On that occasion Mrs. Parkhurst testifies that she presumes she said that she should take what belonged to her, speaking in reference to Mrs. Berdell's claim; that she favored the taking, so far as to express an opinion that she thought Mrs. Berdell was entitled to it. This seems to fall short of evidence upon which a jury could find Mrs. Parkhurst to be a joint actor in the taking. The opinion expressed was not uttered in proximity to the property, nor at the time of the taking, and, of themselves, show no assertion of the slightest dominion over the property (*Gilbert agt. Roberts*, 57 *N. Y.*, 28). As to the other question presented by this appeal the law is in a very unsatisfactory state. The plaintiff is entitled to own property and so is his wife. He can bring action for a conversion against any one who violates his right to have and possess his own property, unless his wife be a person excepted by the relation of husband and wife. She has the same right against all trespassers, unless her husband be the sole exception. It has been decided that a wife may not sue her husband for slander, nor for assault and battery, nor for wages (*Fruthey agt. Fruthey*, 42 *Barb.*, 642; *Longendyke agt. Longendyke*,

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44 *Barb.*, 336; *Parker* agt. *Parker*, 62 *Barb.*, 530; *Shuttleworth* agt. *Winter*, 55 *N. Y.*, 625).

The court of appeals held that a wife did not become liable to answer her husband's administrators for the proceeds of property disposed of by the wife without right, in the lifetime of her husband, when the property was intrusted to the wife by the husband for management and control. On the other hand it has been held that a wife could sue her husband for a conversion of her property. Some question is made whether an action at law could be brought, but that a complaint which stated a conversion stated a cause of action, and that the proper relief should be given even though it was not asked for in the complaint (*Whitney* agt. *Whitney*, 3 *Abb. [N. S.]*, 350).

This court has, in a late case, decided that a wife may sue her husband in ejectment to recover the possession of her property which was wrongfully detained from her by her husband.

We uphold the action upon the ground that whoever owned property and was entitled to its possession could recover it at law against any wrong-doer, including her husband. The same principle should govern this case. The evidence showed more than a mismanagement of property intrusted to the wife by the husband. It showed a tortious taking; a forceable seizure and carrying away under a claim that she owned it and that the husband did not. If he cannot challenge her act in a court of law and recover his property, if it shall be adjudged to be his property, he has not perfect protection in the enjoyment of his property under the law.

We deem his right of action to be clear against his wife, if she has wrongfully taken his property under a claim that it is her separate estate.

The judgment as to Mrs. Parkhurst should be affirmed, with costs, and reversed as to Mrs. Berdell, with costs to abide the event.

McLaughlin agt. The Mayor.

N. Y. COMMON PLEAS.

PHILIP McLAUGHLIN, plaintiff, agt. THE MAYOR, &C., OF NEW YORK, defendants.

Substitution of assignee of plaintiff after his death — Motion for, must be on notice to personal representatives of deceased plaintiff — Practice.

Where a plaintiff had, pending the action, transferred his interest and died, and after his death his assignee, on notice to the defendant alone, moves to be substituted as plaintiff, the motion should be denied for want of notice to the personal representatives of the deceased plaintiff.

General Term, November, 1879.

APPEAL by defendant from order of special term on motion of John Dowling, assignee of plaintiff, to be substituted as plaintiff after death of plaintiff.

Charles P. Miller, for appellant.

E. P. Wilder, for respondent.

J. F. DALY, J. — Plaintiff died during the pendency of the action, and John Dowling, who claimed to be assignee of the cause of action by assignment made during plaintiff's lifetime, upon notice to the defendant only, moved, at special term, for an order that he be substituted as plaintiff. Objection was made that no notice of the application had been given to the personal representatives of the deceased plaintiff. The order was granted and defendant appealed.

In the case of *Franklyn agt. Graham*, reported as a note to section 756 of the new Code (1877), and originally reported in 1860 as a note to section 121 of the former Code, it was held by this court at special term (chief justice DALY), that "where a plaintiff had, pending the action, transferred his

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interest and died, and after his death his assignee, on notice to the defendant alone, moved to be substituted as plaintiff, the motion was denied for want of notice to the personal representatives of the deceased plaintiff." This decision has been followed for over eighteen years in this court, and has not been, as far as we have any knowledge, questioned in this or any other court of the state. The practice so established seems to be eminently proper. It is intended as a check upon any possible fraud upon the estate of the deceased plaintiff, and upon defendant. If the alleged assignment were a forgery defendant, after paying the judgment obtained by the assignee, would be compelled to pay the claim over again when the action was revived by the personal representatives of the deceased and prosecuted to judgment. In that aspect of the case defendant has a vital interest in the inquiry as to the genuineness of the alleged transfer. On the other hand, should the pretended assignee exhaust the ability of defendant by his execution the estate of the deceased plaintiff would be afterwards deprived substantially of the debt.

Defendant has, therefore, an interest in the order, and the representatives of the deceased a still greater interest. It may be said that defendant had the right, upon the motion, to produce proofs of the want of genuineness of the paper, but greater protection is afforded defendant by notice to the representatives of the alleged assignor of the application for substitution of the assignee, for such notice would work an estoppel against the estate in favor of defendant. There might be delay to the assignee because of failure to apply for letters of administration on the estate of the deceased plaintiff, but an assignee who elects to prosecute the action in the name of his assignor takes the chances of inconvenience and delay arising from the death of the latter.

Order reversed.

C. P. DALY, C. J., and BEACH, J., concur.

Matter of Dowd.

MONROE COUNTY SURROGATE'S COURT.

In the Matter of the estate of **PATRICK DOWD**, deceased.

Will—what will work a revocation—who may not claim as residuary legatees—Effect of alteration of the interest of the testator in the property devised after execution of the will.

Where a testator sells and conveys all of his real estate previously devised by him, his estate and interest therein is *wholly divested*, and not merely altered.

At common law the least alteration of the interest of the testator in property devised or bequeathed by him, would work a revocation of the devise or bequest of such property.

An alteration of the nature or character of the interest of the testator in the property devised or bequeathed does not, under the provisions of sections 42 and 48 of 2 Revised Statutes, 64, in all cases work a revocation in respect to such property.

But where the testator, in his lifetime, wholly divests himself of the property previously devised or bequeathed, the revocation is, as to such property, as complete and perfect as it was at common law.

A testator, by his will, bequeathed to his wife all his personal estate and the use for life of all his real estate, and authorized his executors, together with his wife, to sell and convey his real estate, and to deposit the avails in a savings bank, his wife to receive, from time to time, while any of the fund so deposited remained, sufficient for her support during her life, and if any of the avails of such sale remained after paying such expenses, together with her funeral expenses, and the reasonable expenses of the executors, the balance to be paid to St. Mary's Roman Catholic Church and the Roman Catholic orphan asylum. The testator, in his lifetime, and after the execution of the will, sold all his real estate and deposited the avails in the Rochester Savings Bank, such avails constituting his entire estate. His wife died after this sale, but before the death of the testator :

Held, that the corporations named in this will could not take as legatees, the subject-matter of the devise and bequest to them being totally destroyed or changed by the voluntary act of the testator in his lifetime.

The whole scheme of the testator's testamentary disposition was essentially varied by him, and the law presumes a revocation in consequence of the change in his family and property. The fact that he deposited

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the avails of the sale of his real estate in the savings bank is not sufficient to rebut this presumption of law.

Held, further, that the Roman Catholic orphan asylum could not claim as residuary legatees:

When it is manifest, from the expressed words of the will, that the gift of the *residuum* is confined to the residuum of a particular fund, or description of property, or to some certain residuum, the legatee will be restricted to what is thus particularly given.

As in this case if the wife had survived there would have been no residuum as she would have taken the whole as personal estate; she having died before the testator, and the entire estate, by his subsequent act, having become personal property, and being such, at the time of his death, it is to be treated as a lapsed legacy, and in the absence of a legatee capable of taking under the will *pro tanto* revoked, it must be distributed to the next of kin, under the statute of distribution.

Is the provision of the act of 1848 as to devises and bequests for charitable uses repealed by the act of 1860, "relating to wills" (*Chap. 360, Laws of 1860*), *quære*.

September, 1879.

PATRICK DOWD, late of Brighton, Monroe county, made his will March 20, 1863. He bequeathed to his wife, Elizabeth Dowd, all his personal estate, and the use, for life, of all his real. He authorized his executors, "together with his wife," to sell and convey his real estate, and to deposit the avails of the sale in one of the savings banks in Rochester. He directs that his wife should be entitled to receive from his executors, from time to time, while any of the fund so deposited remained, sufficient thereof, to procure her a convenient and comfortable place to live, together with all necessary food and clothing, and all necessary medical attendance, and other necessities in sickness. He then provided as follows:

"If any of the avails of such sale or sales of my real estate shall remain, after paying the expenses above mentioned, together with the funeral expenses of my said wife Elizabeth, then, after such reasonable expenses as my said executors shall be entitled to, then, when such money shall be received by my said executors, they shall pay to St. Mary's Roman Catholic Church, in the city of Rochester, such sum as shall

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remain, not exceeding \$100 in amount, and if any more of such money remain, the same shall be paid over to the Roman Catholic orphan asylum in the city of Rochester."

The testator, in his lifetime, after the execution of the will, sold all his real estate, and deposited the avails in the Rochester Savings Bank. These avails constitute his entire estate.

His wife, Elizabeth Dowd, died after this sale, but before the death of the testator. The next of kin of the testator are his nephews and nieces. They claim his entire estate, after payment of debts and expenses of administration. The Roman Catholic church, and Roman Catholic orphan asylum claim to take such residue, respectively, as legatees under the will.

MONROE, *Surrogate*. — By the sale and conveyance of the testator of all his real estate, previously devised by him, his estate and interest therein was *wholly divested*, and not merely altered.

At common law, the least alteration of the interest of the testator in property devised or bequeathed by him, would work a revocation of the devise or bequest of such property (4 *Kent*, 529). Our Revised Statutes specially define what shall be an express revocation, and what shall be an implied, or, in other words, what shall be "*deemed*" a revocation (*Sections 42-48, 2 Revised Statutes*, 64). An alteration of the nature or character of the interest of the testator, in the property devised or bequeathed, does not, under the provisions of these sections, in all cases, work a revocation in respect to such property.

But, I apprehend, there is no doubt, where the testator, in his lifetime, wholly divests himself of the property previously devised or bequeathed, the revocation is, as to such property as complete and perfect as it was at common law (*Beck* agt. *McGillis*, 9 *Barb.*, 35; *Brown* agt. *Brown*, 16 *Barb.*, 572; *Vandermark* agt. *Vandermark*, 26 *Barb.*, 418; *Adams* agt. *Wynne*, 7 *Paige*, 97; *McNaughton* agt. *McNaughton*, 34 *N. Y.*, 201).

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The will speaks as of the time of the death of the testator; the rights of all devisees, legatees, heirs and next of kin hinge upon that period of time. If the wife had survived the testator, she would have taken the entire estate, all the personal, and all the real converted into personal property before the death of the testator. She would have been sole legatee of "all the testator's personal estate." I think the corporations named in the will cannot take as legatees. The subject-matter of the devise and bequest to them was wholly destroyed or changed by the voluntary act of the testator in his lifetime. The whole scheme of his testamentary disposition was essentially varied by him, and the law presumes a revocation in consequence of the change in his family and property. The fact that he deposited the avails of the sale of his real estate in the savings bank is not sufficient to rebut this presumption of law (*See Adams agt. Wynne*, 7 Paige, 99). It is quite possible that, but for this revocation by the act of the testator, the ulterior devise to these corporations would have taken effect on the failure of the primary devise, by the death of the wife in the lifetime of the testator (*McLean agt. Freeman*, 70 N. Y., 81). But I am unable to see how, unless by a republication after such revocation, their claim to the bounty of the testator under this will can prevail.

The Roman Catholic orphan asylum cannot, I think, successfully claim, as residuary legatees, for another reason. When it is manifest, from the express words of the will, that the gift of the *residuum* is confined to the residuum of a particular fund, or description of property, or to some certain *residuum*, the legatee will be restricted to what is thus particularly given. In this case the thing given is gone (*Dayton on Surrogates*, page 440). If the wife had survived there would have been no *residuum*; she would have taken the whole as personal estate. As she died before the testator, and the entire estate, by his subsequent act, became personal property, and was such at the time of his death, it is to be treated as a lapsed legacy, and, in the absence of a legatee

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capable of taking under the will *pro tanto* revoked, I think it must be distributed to the next of kin, under the statute of distribution.

This view of the case renders it unnecessary to decide the interesting question involved in the construction of the statutes on the subject of devises and bequests to charitable uses.

The change in the phraseology in the latter statute (*Section 1, chap. 360, Laws of 1860*) by substituting the word "having" for "leaving," found in section 6, chapter 319, Laws of 1848, is noticeable, although it seems to have been ignored by the court of appeals in *Lefevre agt. Lefevre* (59 *N. Y.*, 434). In that case the majority of the court apparently hold that the provisions of the earlier statute on this subject, limiting the time for a valid devise or bequest to benevolent and charitable societies, were not repealed by the latter act. Section 2 of the act of 1860 repeals all laws inconsistent with the act, and the court characterizes *only* that part of the proviso of section 6 of the act of 1848, which forbids the taking, by the corporations named, of a devise in a will not made more than two months before death, as being in harmony with the act of 1860. The fair inference is that all other provisions of the earlier act are inconsistent with the latter.

The word "having" may be construed as referring only to the time of the execution of the will without involving the serious consequences urged by way of argument against such interpretation, inasmuch as under sections 43 and 44 Revised Statutes above referred to, the subsequent marriage of a *testator*, followed by birth of children, or a subsequent marriage *alone* of an *unmarried testatrix*, are to be "*deemed*" revocations of their wills respectively. It seems, therefore, not unreasonable to infer that the legislature intended by the act of 1860 to designate the *time of the execution of a will* as the period of time when the restrictions therein provided for were to be operative. This impression is fortified by the fact that the earlier act was passed, not so much for the protection of families as to cater to a popular sentiment then

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quite prevalent. As already stated, however, we do not deem it necessary to pass upon this question in this aspect not yet, so far as we are aware, sharply presented to the court of last resort.

SUPREME COURT.

ARCHIBALD M. BLISS agt. JULIUS F. MOLTER *et al.*

Affidavit made before an attorney in the action — discharge of attachment.

The acknowledgment of an undertaking, executed in pursuance of the provisions of the Code of Civil Procedure, and the justification of the sureties therein, written thereon, are essential parts of the instrument (*Code of Civil Procedure, secs. 810, 812*).

The affidavits of justification of sureties, on an undertaking given to discharge an attachment, are affidavits made in the action and, if made before the attorney for the defendant, the undertaking will not be approved or the discharge granted.

Special Term, December, 1879.

In this action plaintiff obtained an attachment against the property of the defendants. Defendants having filed an undertaking made a motion to discharge the attachment. Plaintiff opposed the motion on the ground that the undertaking had been executed before defendants' attorney as notary. In reply, defendants' attorney claimed that the undertaking had been executed before he appeared in the action as attorney.

D. S. Ritterband, for defendant, for the motion.

Adolphus D. Pape, for plaintiff, opposed.

VAN VORST, J.—The rule excluding from consideration affidavits taken in an action before the attorney therein, as a

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notary or commissioner, is an old one (*Taylor agt. Hatch*, 12 *Johnson*, 340 ; *Anon.*, 4 *How.*, 290).

The execution of this undertaking was acknowledged, and the justification of the sureties was had, before the person whose name is indorsed on the undertaking as attorney for the defendant.

The acknowledgment of the undertaking and the justification of the sureties are essential portions of the instrument (*Code of Civil Procedure*, *secs.* 810, 812).

The affidavits were taken in a pending action, the one in which the undertaking is entitled.

Although the attorney did not indorse his name on the paper, until after the affidavits were taken, still it is quite apparent that, in preparing the undertaking, he was acting as the attorney for the defendant and would not be likely to indorse his name until after the completion of the instrument.

The application for the discharge of the attachment can only be made after the defendant has appeared, and upon such application he gives the undertaking (*Code*, *secs.* 687, 688).

Vary agt. Godfrey (6 *Cowen*, 587) implies that if the person was *retained* as attorney, that would be sufficient to exclude the affidavit.

It is suggested that these cases are all before the Code, but I do not understand that the Code has made a different rule in this regard.

It is only right that the plaintiff should have a good undertaking in substance and in form, as its effect is to release the lien of his attachment.

The undertaking cannot be approved, and the order discharging the attachment, which is asked, cannot be granted and a new undertaking must be made.

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U. S. CIRCUIT COURT

JOHN CHRISTMAN and P. ELMENDORF SLOAN agt. JOHN A.
RUMSEY and MOSES RUMSEY.

Patent — Driven wells — Grounds for a reissue of a patent — what is not new matter within the meaning of the statute — Though one claim is invalid it does not prevent a recovery on the other.

Where the petition for a reissue of a patent sets forth that by reason of an insufficient or defective specification the original patent is inoperative or invalid, and that such error arose from inadvertence, accident or mistake, and without any fraudulent or deceptive intention:

Held, that this is a ground of reissue set forth in section 53 of the act of July 8, 1870 (16 U. S. Stat. at Large, 205), and the decision as to the fact set forth belongs exclusively to the commissioners of patents, and his action conclusively establishes that fact.

Where it was urged that the original specification stated the invention to be "a new and improved pump filter," while the reissue specification states the invention to be "an improvement in pump filters;" it being also contended that the original claims the whole and nothing else, while the reissue makes two claims, neither of which claims the whole or includes the collar or head-piece "B," and that the first two sentences above cited in the reissued specification are new matter in violation of section 53 of the act of 1870:

Held, that these two sentences cannot properly be called "new matter" within the meaning of the statute. They do not at all relate to the description or operation of the apparatus of the patentee.

Held, further, that the difficulties stated to have existed in prior pointed pump tubes may well have been known to the patentee from hearsay, although the first driven well point he may have seen was his own. As the patentee's pump tube is a pointed pump tube, and as it does overcome such difficulties in clogging in such a tube, the presumption is that it was made to overcome such difficulties, and, therefore, that such difficulties had been heard of by the patentee.

It is further urged that the original specification describes the invention as applicable to all pump filters, whether used upon points for driven wells or upon well tubes used in open wells or cisterns or streams, while the reissued specification introduces new matter by confining the invention to driven wells only. It is contended that in this there is a violation not only of the provisions of section 53 of the act of 1870 in regard to

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new matter, but a violation of the provision of that section, that in case of a machine patent neither the model nor the drawings shall be amended, except each by the other:

Held, that as the same idea is found in the original specification and drawing, taken together, there is no new matter in the reissued specification or in the reissued drawing.

Where the claim of the original patent was this: A pump filter composed of the parts A, B and C, substantially as and for the purposes described, it is urged that such claim included the three distinct parts, A, B and C, in combination, embracing the whole of the structure described; that there is no suggestion in the original specification that the patentee had invented any combination or parts less than the whole, and that each of the claims of the reissue is for a combination of parts less than the whole, and is, therefore, void:

Held, that, under the decision in the *Corn Planter Patent* (23 Wallace, 181), the reissue in the present case cannot be held to be void. The drawings of the original and the reissue being the same, and the two specifications describing the same mechanical structure, with the same mode of operation, it must be held to be lawful to reissue the patent with claims to combinations of fewer elements than were contained in the combination claimed in the claim of the original patent. The original claimed a general and larger combination, and the reissue claims sub-combinations which enter into such general and larger combinations. Such a reissue is sustainable on the ground that the reissue was for things contained within the apparatus described in the original patent.

Held, further, that it is of no importance that the wire gauze "C," may not, by itself, have been new; or that the open grating or ground "A," may not, by itself, have been new; or that any other ingredient of the combination claimed in the reissue may not, by itself, have been new so long as the combinations, as claimed, were new.

That the two claims of the reissue do not claim combinations, but claim merely aggregations of parts, is not regarded as a tenable objection. The object of the combination claimed in the first claim is to enable the structure to be driven into the earth, and these serve for a pump and a filter without being injured in driving. Nothing less than a combination of all the elements in such combination will accomplish all the objects which such combination will accomplish. So, too, the grating and the wire gauze of the second claim act in combination in controlling the passage of the water from the outside of the grating to the interior of the wire gauze.

Held, also, that although the second claim is invalid for want of novelty, the plaintiff can recover on the first claim under section 60 of the act of July 8, 1870 (16 U. S. Stat. at Large, 207; now section 4922 of the Revised Statutes), although no disclaimer has been made as yet to

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the second claim, provided that, prior to the entry herein as to such first claim, they make a disclaimer under section 4917 of the Revised Statutes, as to the second claim, it not appearing that there has been heretofore any unreasonable neglect or delay to enter such disclaimer; but as such disclaimer was not entered before the commencement of this suit, the plaintiffs will not be entitled to recover any costs of this suit.

Northern District of New York, September, 1879.

J. J. Greenough and Irving G. Vann, for the plaintiffs.

David Wright, for the defendants.

BLATCHFORD J.—This suit is brought on reissued letters patent, granted to John Christman, March 24, 1874, for an "improvement in pump filters." The specification says: "In pointed pump tubes heretofore essayed, difficulties have arisen in keeping them free from clogging and rendering them efficient. My invention was made to overcome these difficulties, in which I have fully succeeded. The construction of my apparatus is substantially as follows, referring to the accompanying drawing, which is a side elevation of the filtering point made for driving, affixed to the lower end of a pump tube with the side grating "A" broken, to show the wire gauze "C." I form an open grating "A," of rods of proper sized wire of a convenient length and form the upper ends of which are permanently affixed to a collar or head-piece "B" on which a screw may be cut, to affix it to the lower end of the pump tube "D." This screw may be cut on the inside, as shown by the drawing, or on the outside, as preferred, the joint being made in any well known way. The open grate "A" extends down cylindrically in the drawing a sufficient distance, and is thence tapered and brought into a solid point "A" as in the drawing; or it may be made rounded or square, so there is a solid, compact end adapted to the purposes intended. Inside the grating "A" I insert another tube "C," made of wire gauze, and covering the

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spaces between the bars of the grate "A" and properly fastened in place which, I find, makes, in connection with the strong supporting grating, a perfect filter, to be used at the bottom of pump tubes; where it is required, as in quicksands, &c., there may be a filtering medium put inside the wire gauze, to resist the outside pressure, but for ordinary cases no such packing is necessary." The claims of the reissue are as follows:

"1. The combination of a wire gauze "C" with an open grating or guard "A" of sufficient strength for the purpose required, and a point "A" constructed substantially as and for the purposes described. 2. The combination of a grating "A" having apertures through it for the passage of the water to the interior forming the lower end of a pump tube, with a wire gauze "C" for filtering the water, substantially as described."

The original letters patent were granted to John Christman, November 28, 1865, for an "improvement in pump filters."

The specification of the original says: "Be it known that I, John Christman, of the city of Syracuse, N. Y., have invented a new and improved filter, and I do hereby declare that the following is a full, clear and exact description of the construction of the same and the form thereof, when complete, reference being had to the annexed drawings making a part of this specification. The letters used represent the same parts wherever they occur. To enable others skilled in the art to make and use my invention, I will proceed to describe the construction of the filter and its form when complete and ready for use. I use any kind of common wire and arrange sections thereof in a tubular form "A" so that the longitudinal sections *a, a, a, a, &c.*, will form an open grate. The ends of the wire sections designed for the lower end of the filter are welded together in a compact form, which may be round, pointed, or square across. The ends of the wire sections designed for the upper part of the filter are made to pass between two shoulders *b* to the inner one,

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and *c* the outer one, forming a part of the round head-piece "B" thus keeping them in a circular or tubular form, and, to hold the same firmly, the outer shoulder, *c*, may be soldered down upon the wire sections, and the same thus held securely in their places. The head-piece will be of sufficient length so that the upper end thereof may receive the cut of a screw, either on the inside or the outside, as may be desirable, as seen at *d*, to receive the pump tube "D." Fitting the inside of the wire tube thus formed I insert another tube "C" made of common wire gauze, and the two thus formed make a strong and perfect filter to be used at the bottom of pump tubes. The tube of wire gauze may, in case there is quicksand, be packed with charcoal or other filtering substances, but, for ordinary use, no such packing would be necessary." The claim of the original patent was this: "A pump filter composed of the parts A, B and C substantially as and for the purposes described."

It is contended for the defendants that the reissue is void. The petition for the reissue sets forth that, by reason of an insufficient or defective specification, the original patent is inoperative or invalid, and that such error arose from inadvertence, accident or mistake, and without any fraudulent or deceptive intention. This is a ground of reissue set forth in section 53 of the act of July 8, 1870 (16 *U. S. Stat. at Large*, 205). The decision as to the fact so set forth belonged exclusively to the commissioner of patents, and his action conclusively established that fact (*Seymour* agt. *Osborne*, 11 *Wall.*, 516, 543-545; *Herring* agt. *Nelson*, 14 *Blatch. C. C. R.*, 293).

It is further contended that new matter has been introduced into the specification of the reissue, in violation of section 53 of the act of 1870. It is urged that the original specification states the invention to be "a new and improved pump filter," while the reissue specification states the invention to be "an improvement in pump filters;" that the original claims the whole and nothing else, while the reissue makes two

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claims, neither of which claims the whole, or includes the collar or head-piece "B;" and that the first two sentences above cited, in the reissued specification, are new matter.

These two sentences cannot properly be called "new matter" within the meaning of the statute. They do not at all relate to the description or operation of the apparatus of the patentee.

The difficulties stated to have existed in prior pointed pump tubes, may well have been known to the patentee from hearsay; although the first driven well point he may have seen was his own. Certainly, as the patentee's pump tube is a pointed pump tube, and as it does overcome the difficulties in clogging, in such a tube, the presumption is, that it was made to overcome such difficulties, and, therefore, that such difficulties had been heard of by the patentee.

It is further urged that the original specification describes the invention as applicable to all pump filters, whether used upon points for driven wells or upon well tubes used in open wells, or cisterns or streams, while the reissued specification introduces new matters by confining the invention to driven wells only. This is claimed to be shown by the fact that the original states that "the ends of the wire sections designed for the lower part of the filter are welded together in a compact form, which may be round, pointed or square across," in the reissue it is stated that the open grating "A," is formed of rods of proper sized wire of a convenient length and form, the upper ends of which are permanently affixed to a collar or a head-piece "B," and that the open grate extends down cylindrically a sufficient distance, and is thence tapered and brought into a solid point, "A." The original states that sections of wire are arranged in a tubular form, "A," so that the longitudinal section form an open grate. It is contended that as there is no "A'" in the original drawing, and as "A," in that drawing, includes the whole of the open grate, from the welded point to the head-piece "B," and as, in the reissue drawing, the cylindrical part is lettered "A," and the tapered

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part is lettered "A,'" the restriction in the reissue of the grating "A" to the cylindrical part above the taper, and the lettering "A'" in the reissue drawing, are new matter not warranted by the original drawing or model. It is contended that in this, there is a violation, not only of the provisions of section 53 of the act of 1870, in regard to new matter, but a violation of the provision of that section, that, in case of a machine patent neither the model nor the drawings shall be amended, except each by the other; that a new division or element is made in the drawing, called "A'"; that the drawing has been amended by dividing the grating into two parts, without any warrant therefor from the model; and that this was a material change, because it was intended to change the original hollow point as described in the original specification, and as shown in the original drawing and by the model, into a solid point, including all of the tapering part as solid matter.

There is no substantial difference between the drawing attached to the original patent and that attached to the reissued patent. The form of the whole structure, as a whole, is the same in each. The forms of the several parts are the same in each. In each of the protecting grating is cylindrical above and then tapers below, in the form of an inverted cone, to a point. In the original drawing the whole grating, from the head-piece to the point, is lettered "A'." In the reissue drawing the cylindrical part of the grating is lettered "A," and the tapering part is lettered "A'." It is not perceived that there is any force in these objections taken by the defendants. The drawing of the original patent shows a pointed pump tube capable of being driven to make a driven well. The original specification says: "The ends of the wire sections designed for the lower part of the filter are welded together in a compact form which may be round, pointed or square across." There is nothing in this language, properly construed, which indicates that the patentee contemplated the use of the structure in any other well than a driven well. It speaks of the "wire sections designed for the lower part

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of the filter." The "lower part of the filter" is the part from where the taper begins downward. The ends of these wire sections, that is, their lower ends are welded together in a compact form. Why, in a compact form? Evidently, to get a driving point. Unless the ends were compact, in the sense of being compacted to a point, there could be no driving. There is no suggestion that the lower ends are to be rounded or square across. If they were they could not be driven. The words "which may be round, pointed or square across" refer to something which may, at the same place, be, optionally, either round, pointed or square across. It is not the "ends" which are to be round, pointed or square across, it is the "lower part of the filter" which is to be "round, pointed or square across."

The lower part of the filter is the part from where the taper begins downward. Such part may not have its up and down outside line from the lower end of the cylindrical part downward to the end, the line of a cone, as in the drawing; but such outside line may be rounded and more bulging than the line of a cone, so it be not of greater diameter than the cylindrical part, provided, the lower ends, the wires are welded together in a compact form; or such part be pointed, that is, its outside line may be the line of a cone, going in a straight line from the lower end of the cylindrical part to the point; or such point may be square across, that is, it may be an inverted pyramid with its cross-section anywhere a square, provided the lower ends of the wires in the four sides are welded together in a compact form. This is the only reasonable meaning of the words. They are inartificially put together, but in the reissue the language is: "The open grate A', extending down cylindrically in the drawing a sufficient distance, and is then tapered and brought into a solid point A', as in the drawing, or it may be made rounded or square so there is a solid compact end adapted to the purposes intended." In the drawing the open grate "A" does extend down cylindrically for a distance and it is then tapered, that

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is, the open grate continues in the tapered part. The tapered part is not, all of it, solid. After that part of the tapered part, which is an open grate, comes the solid driving point into which the tapered open grate is brought. The letter A in the drawing of the reissue is not at or near the solid point. It is opposite open grating on the tapered part. The statement that the open grate, after leaving the cylindrical form, "is then tapered and brought into a solid point A' as in the drawing," does not mean that A' is the solid point, or that the solid point is A,' or that the whole of the tapered part is solid. It means that the part below the cylindrical part is A'; that it is tapered as it goes down; that it is brought at its lower end into a solid point, and that the whole part which is thus tapered and brought into a solid point is designated as A' in the drawing. The statement further is, that the part which is tapered, that is, conical, or, as in the original, pointed, may alternately be made rounded or square, or, as in the original, round or square across, in the senses before explained. There is a proviso, that in each one of the three cases there must be a solid, compact end adapted to the purposes intended, that is, for a pointed pump tube made for driving.

This same idea is found in the original specification and drawing, taken together. There is no new matter, in this regard, in the reissued specification, or in the reissued drawing, nor is the added lettering "A'" new matter. It is not perceived that any intention is disclosed, in the reissue, to make the whole of the tapering part solid. It is further contended that the reissue is not for the same invention, or for any invention described in the original specification as the invention of the patentee. The cases of *Gill agt. Wells* (22 *Wallace*, 1), and *Russell agt. Dodge* (3 *Otto*, 460), are relied on as authorities. The claim of the original patent was this: A pump filter, composed of the parts A, B and C, substantially as and for the purposes described." It is urged that such claim included the three distinct parts A, B and C, in

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combination embracing the whole of the structure described; that there is no suggestion in the original specification, that the patentee had invented any combination of parts less than the whole; and that each of the claims of the reissue is for a combination of parts less than the whole, and is, therefore, void. The view taken by this court in *Herring agt. Nelson* (before cited), of the decisions in *Gill agt. Wells*, and *Russell agt. Dodge*, seems to me to be a sound one. Under the decision in the *Corn Planter Patent* (23 Wallace, 181), which was subsequent to that in *Gill agt. Wells*, the reissue in the present case cannot be held to be void. The drawings of the original and the reissue being the same, and the two specifications describing the same mechanical structure, with the same mode of operation, it must be held to be lawful to reissue the patent with claims to combinations of fewer elements than were contained in the combination claimed in the claim of the original patent. The original claimed a general and larger combination, and the reissue claims subcombinations which enter into such general and large combinations. Such a reissue was sustained in the *Corn Planter Patent*, on the ground that the reissue was for things contained within the apparatus described in the original patent, and against the effort to control the case by the decision in *Gill agt. Wells*.

It is of no importance that the wire gauze "C," may not, by itself, have been new, or that the open grating or ground "A" may not, by itself, have been new, or that any other ingredient of the combinations claimed in the reissue may not, by itself, have been new so long as the combinations, as claimed, were new.

As stated before A', in the drawing of the reissue and in the text of the reissued specification, does not mean the solid point alone, by itself, but includes the whole of the tapering point, which tapering point is an open grate from the lower end of the cylindrical part of the open grate down to where the solid compact end begins, and the solid compact end forms the rest of the tapering part and the rest of A'. The

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reissued specification says that the open grate is tapered from where its cylindrical part stops, that is, that the open grate continues into the tapered part down to where the solid compact end begins. The drawing shows that. So, where the first claim of the reissue speaks of "a point A'," it means the whole of what is lettered "A'," the whole of what is so tapered from the lower end of the cylindrical part to the lower end of the solid compact end, and it does not mean merely the solid compact end.

It is further contended that the two claims of the reissue do not claim combinations but claim merely aggregations of parts. The object of the combination claimed in the first claim is to enable the structure to be driven into the earth, and these serve for a pump and a filter without being injured in driving. Nothing less than a combination of all the elements in such combination will accomplish all the objects which such combination will accomplish. So, too, the grating and the wire gauze of the second claim act in combination in controlling the passage of the water from the outside of the grating to the interior of the wire gauze. The objection is not regarded as tenable.

The application for Christman's original patent was filed in the patent office, August 1, 1865. The invention was made by him in the spring of 1864. The model sent by him to the patent office was made in the spring of 1865.

The patent to Phelps and Holten, of June 12, 1855, for a "metallic medium for filtering," describes the use, for filtering water, of several thicknesses of fine wire gauze prepared by passing it through metallic roles under a sufficient pressure to flatten the wire and reduce the interstices. There is no suggestion of a driven well or of a protecting grating or of any necessity for such grating.

The patent to DeBuffon, of April 14, 1857, for an "improved apparatus for filtering liquids," describes a structure consisting of an internal metal tube perforated with holes, through which the filtered water passes, and surrounded on the out-

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side by a wire gauze cylinder, the space between the two cylinders being filled with permeable materials. There is no suggestion of a driven well.

The patent to May, of August 1, 1865, is subsequent in date to Christman's invention.

Hewitt's deep well pump, used in 1858, 1859 and 1860, was a perforated basket attachment, with wire gauze wound round its outside, as a water strainer. It could not be taken down by the driving of a well point. The apparatus of Hughes was a perforated pipe with a screen of wire gauze round it, and was not for driving. The apparatus of Suggett was a single tube for driving with a point, and with perforations in the tube above the top of the point.

In the defendants' apparatus there is a perforated tube, surrounded on the outside by two thicknesses of finely perforated copper, and a covering of perforated metal outside of the perforated copper. Below this is a solid well point for driving, this solid point is enlarged near its upper part so as to be larger in diameter than the pipe above, and thus afford additional protection to the finely perforated copper. The defendants allege that their structure does not infringe the claims of Christman's reissue; they insist that their perforated tube and driving well point are like those used by Suggett before Christman's invention, and that their finely perforated copper, if substantially wire gauze, is the wire gauze of Phelps and Holten, and of DeBuffon, and of Hewitt, and of Hughes; that they use no wires, and have no wire grating and no head-piece; that their driving point is solid from where the tapering begins and all open; that the plaintiff's structure cannot have its tapering part enlarged at its upper part; and that it required no invention to cover the perforated part of Suggett's apparatus with wire gauze or finely perforated copper sheets.

The defendants' apparatus can be driven and then remain as a pump bottom and a filter. The filter in it is substantially wire gauze, and such filter is protected in driving by the

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perforated outside metal. The enlargement of the top of the point may be an added protection, but the office of the metal pipe outside of the finely perforated copper is to protect the latter while the structure is being driven and afterwards. Such outside perforated metal pipe while it protects the copper inside of it permits the water to freely pass inwardly through it, and it is, substantially, an open grating. The combination found in the first claim of the plaintiffs' reissue, is substantially found in the defendants' structure. The defendants have substantially a wire gauze filter with a protection grating, or guard outside of it, of sufficient strength for the purpose required and a tapering driving point. The perforated tube inside of the copper is an addition which does not destroy the combination of the copper with the protection guard outside of it.

The plaintiffs' tapering part may have a less part of it solid than the defendants' tapering part, but all that is necessary is to have enough of it solid, or compact, beginning at the lowest point, to enable it to be driven according to the nature of the soil. It is in evidence that structures like that described and shown in the specifications and drawings of Christman's original and reissued patents were driven by him in 1865, and have worked successfully ever since. If the solid point for driving is sustained by a rigid metallic tubular grating that connects it with the pump-tube above, that is all that is essential. Whether this connection be by a head-piece or collar where the open grating is of wires, or whether the head-piece is omitted because unnecessary, where the grating is of inflexible metal, is not of the essence of Christman's invention. In either case the structure is equally carried by the driving of the tube, so as to arrive at its resting place in a condition to act perfectly as a filter. It therefore appears that the combination covered by the first claim of the plaintiffs' reissued patent is found in the defendants' structure. It also appears that such combination is not found in any of the prior structures adduced by the defendants, and that it involved the exercise of invention

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to arrive at such combination, in view of everything that previously existed.

The combination covered by the second claim of the plaintiffs' reissue seems to be a combination of the grating above the tapering point, with the wire gauze inside of such grating, excluding the tapering part and the driving point, and to have no exclusive relation to a driven well, though capable of use in it. Aside from driving, the combination of the grating and the wire gauze, as a filter, is the same thing as a combination, whether the wire gauze is inside of the grating or outside of it, so long as the apparatus is at the lower end of a pump-tube. In this view Hewitt and Hughes anticipated Christman as to such second claim, and it is invalid, provided the testimony is available to the defendants. Hughes, Hewitt, Field and McCue testify to substantially the same prior arrangement. None of them are named in the answer. Although the testimony of Hughes was objected to on that account when taken, the testimony of the other three witnesses was not objected to. Although the second claim is invalid for want of novelty, the plaintiff can recover on the first claim under section 60 of the act of July 8, 1870 (16 *U. S. Stat. at Large*, 207; now section 4922 of the *Revised Statutes*), although no disclaimer has been made as yet as to the second claim, provided that, prior to the entry of a decree herein as to such first claim, they make a disclaimer under section 4917 of the *Revised Statutes* as to the second claim, it not appearing that there has been heretofore any unreasonable neglect or delay to enter such disclaimer; but as such disclaimer was not entered before the commencement of this suit, the plaintiffs will not be entitled to recover any costs of this suit (*Rev. Stat. [U. S.], sec. 4922*).

Let a decree be entered for an account of profits and damages, and for a perpetual injunction as to the first claim.

Matter of assignment of Stockbridge and Martin.

N. Y. COMMON PLEAS.

In the Matter of the assignment of JOSEPH STOCKBRIDGE and
HENRY F. MARTIN to ISAAC BRISTOW.

Attachment not the proper remedy for the enforcement of a final decree in accounting — Code of Civil Procedure, sections 1240 and 14, subdivision 3.

A final decree in accounting cannot be enforced by attachment. Such decree is only enforceable by execution

Special Term, November, 1879.

MOTION by Oscar Hoyt and others, creditors of the assignors, for an attachment against the assignee for failing to pay such creditors' distributive share pursuant to final decree or accounting.

Upon the final accounting of the assignee, pursuant to the general assignment act (*chap. 318, Laws of 1878, sec. 20, amending chap. 466, Laws of 1877*), a decree was made by this court charging the assignee with the sum of \$8,205.97, and \$1,458.74 interest, making a total of \$9,664.21. After an allowance of certain credits, for expenses, &c., the decree directed the distribution of the balance (which was \$7,131.08) among creditors therein named. Oscar Hoyt was to receive \$100.56; Arnold E. Smith, receiver of C. B. Herrimen, \$166.34; Isaac Petty, \$182.14; Adams & Co., \$51.30; Gregg & Woolner, \$1,326.17; Edwin Walters, \$509.51; Joseph Bensusan, \$601.13; Schultze & Failer, \$121.54; Buchanan & Co., \$1,328.35; Clement Heerd & Co., \$201.94; Newcomb, Buchanan & Co., \$815.39; W. M. Thompson, \$67.32; William H. Starin, \$1,099.20; and payment thereof to said creditors or their attorneys was directed to be made forthwith.

A copy of the decree was served on the assignee and a written demand made by James R. Adams, Esq., the attorney for

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all the creditors above specified, for the sums awarded them. The assignee's answer to the demand was "that he had no money of the assigned estate referred to in said decree, and could not pay the money required to be paid by said decree or comply with its terms."

The said creditors then made this motion for an attachment.

The assignee, in opposition to the motion, alleges, by affidavit, that the funds of the assigned estate were collected and kept by the firm of which he was a member (George W. Kidd & Co.), and have ever since been retained by them; that George W. Kidd is one of the sureties on his bond, as assignee, and is amply responsible; that he, the assignee, has been expelled or excluded from the said firm by the other members thereof, and that he has commenced an action against the firm with the object of recovering the said trust funds, which action is still pending.

Affidavits are read by the creditors to show that the assignee has drawn out of the firm of which he was a member all the trust funds and all his capital, and that the other partners dissolved the copartnership with him for certain irregularities and misconduct.

An action against the sureties of the assignee is now prosecuted by the creditors.

Samuel G. Adams, for motion.

Frank K. Pendleton, for assignee.

J. F. DALY, J. — A final decree in accounting cannot be enforced by attachment. Provision for enforcing such a decree is expressly made by section 22 of the general assignment act (*Laws of 1878, chap. 318, section 6, amending sec. 22 of chap. 466, Laws of 1877*). It is there enacted that all decrees in proceedings under this act shall have the same force and effect, and may be entered, docketed and enforced, and appealed from the same as if made in an original action

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brought in the county court. Judgments and decrees of the county court are enforced by execution where the judgment is for a sum of money, or "directs the payment of a sum of money" (*Code, sec. 1240*). The judgment being enforceable by execution, the court has no power to punish the party for not paying by fine and imprisonment (*Code, sec. 14, sub. 3*). Such was the state of the law prior to the Code (*Hosack agt. Rogers, 11 Paige, 603*).

The general assignment act above cited provides further (*sec. 20*) that the county judge may exercise such powers in respect to the proceedings and the accounting as a surrogate may, by law, exercise in reference to an accounting by an executor or administrator. It also provides (*sec. 25*) that the court may exercise the powers of a court of equity in reference to the trust and any matter involved therein. Giving these provisions the effect of controlling the mode of enforcing final decrees in accounting they do not confer the power of punishing by fine and imprisonment, disobedience to a final decree for the payment of money, since neither the surrogate nor the court of chancery could commit as for a contempt in such a case (*Matter of Watson, 69 N. Y., 536*). Such decrees could be enforced only by execution against the property and against the body.

It is plain, however, that these provisions of sections 20 and 25 give this court full power to punish, by attachment, for contempt, disobedience to interlocutory orders for the deposit, payment or transfer of funds and property in the hands of the assignee or under his control, and for disobedience to final decrees other than for the payment of money (*Code, sec. 14, sub. 3; Matter of Watson; Horack agt. Rogers, supra*).

Motion denied, but as the question is new in these proceedings, without costs.

Barrowcliffe agt. La Caisse Generale.

N. Y. MARINE COURT.

ALICE M. BARROWCLIFFE agt. LA CAISSE GENERALE DES
ASSURANCES AGRICOLES ET DES ASSURANCE CONTRE
L'INCENDIE.

*Removal of cause—Action against an alien defendant—Where plaintiff is
an alien cannot be removed—Foreign corporation an alien.*

An action pending in a state court against an alien defendant cannot be removed into the United States circuit court for trial, under the acts of congress, upon the ground of such alienage, if the plaintiff be also an alien.

For the purpose of federal cognizance a corporation created under the laws of the republic of France is an alien.

Special Term, September, 1879.

MOTION to remove action to United States circuit court.

William Barnes, for plaintiff.

W. B. Nassau, for defendant.

McADAM, J.—The defendant—upon a verified petition, setting forth that the action is brought to recover \$1,505.55 upon a policy of fire insurance; that the plaintiff is a subject of the queen of Great Britain; that the defendant is a corporation created under the laws of the republic of France, and that the matters in dispute arise under the laws of the United States—seeks to remove the action into the United States circuit court for trial, pursuant to the acts of congress authorizing such a transfer in certain specified cases wherein the defendant is an alien (*U. S. Rev. Stat.*, secs 639, 640).

The defendant is to be regarded, for the purposes of federal jurisdiction, as if it were a natural person and a citizen of the republic of France, under whose laws it was created (*Rimple*

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agt. *Delaware and R. Canal Company*, 14 *How.* [U. S.], 1, 80; *Id.*, 446; *Id.*, 468; *Marshall* agt. *Baltimore and Ohio R. Co.*, 16 *id.*, 314; *Stevens* agt. *Phenix Ins. Co.*, 41 *N. Y.*, 149; *Barney* agt. *Globe Bank*, 2 *Am. Law. Reg.* [N. S.], 221).

The defendant is, therefore, an alien within the meaning of section 639 (*supra*). The difficulty the defendant has to contend with is that the plaintiff is also an alien, and it has been held that the courts of the United States have not jurisdiction of suits between aliens, but only where an alien or aliens constitute one party and a citizen or citizens the other (*Mossman* agt. *Higginson*, 4 *Dallas*, 12; *Martilet* agt. *Murray*, 4 *Cranch*, 46; *Hodgson* agt. *Bousback*, 5 *Cranch*, 303; *Hard* agt. *Arconde*, 1 *Paine*, 410; *Dennistown* agt. *N. Y. and New Haven R. R. Co.*, 1 *Hilton*, 65; *Galvin* agt. *Boutwell*, 9 *Blatch. C. C.*, 470), and that actions between aliens cannot be transferred by and from the state courts on the sole ground of alienism.

The petition is also defective in not alleging facts which show the case to be one of federal cognizance. It should have been stated how and in what manner the matters in dispute arise under the laws of the United States (*Dillon on Removal of Causes*, p. 64), for the plaintiff's complaint, standing alone, does not indicate that any such question can possibly arise in reference to any of the matters therein alleged.

The motion to remove the action to the United States circuit court will, therefore, be denied, with ten dollars costs.

Lynch agt. Rinaldo.

N. Y. COMMON PLEAS.

THERESE LYNCH agt. MARKS RINALDO.

Apportionment of interest money as between vendor and purchaser.

Where property is conveyed subject to a mortgage upon which back interest has accrued, but has not become payable according to the terms of the instrument, and the vendee is obliged to pay such interest to the holder of the mortgage when it becomes due:

Held, that the vendee has no cause of action against the vendor for the proportionate amount which had accrued prior to the delivery of the deed, in the absence of an express covenant upon the part of the vendor to pay the same.

Rent, when apportioned as between assignor and assignee, see note at foot of case.

General Term, December, 1876.

ON the 29th day of April, 1873, the defendant entered into an agreement in writing with the plaintiff to convey to her, on May 15, 1873, certain buildings known as Nos. 309 and 311 East Thirty-eighth street, New York city. The premises, in accordance with the terms of the contract, were to be conveyed subject to a mortgage amounting to \$8,000, and which she, the plaintiff, assumed and agreed to pay.

Rinaldo, in accordance and compliance with the terms of his contract, on May 15, 1873, by deed duly executed by himself and wife, conveyed said premises to Mrs. Lynch, subject, however, to the mortgage given to secure the payment of the sum of \$8,000, and which mortgage Mrs. Lynch, the plaintiff, in and by said deed, assumed and agreed to pay.

At the time of the delivery of the deed (May 15, 1873) interest had accrued on the mortgage since December, 1872, although it was not due or payable, according to its terms, until June 30, 1873.

There were some taxes and assessments on the property

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remaining unpaid which Rinaldo arranged satisfactorily with Mrs. Lynch, but nothing was said by either party about the payment of any interest on the mortgage, which semi-annual interest was to become due about two months after the passing of the title, to wit, on or about June 30, 1873.

The plaintiff claimed to have paid the semi-annual interest which became due on June 30, 1873, and brought this suit to recover the portion thereof from December 30, 1872, till the time of the delivery of the deed on the 15th of May, 1873, on the ground that he contracted and agreed with her, as she alleges, in the month of May, 1873, for a good and valuable consideration, to pay the same. But no such agreement appears in the written contract the parties executed, or in the deed subsequently delivered in pursuance of such contract, and no satisfactory evidence to support such an agreement was offered on the trial.

The cause was tried before judge VAN BRUNT and a jury at trial term, in January, 1876, and resulted in a dismissal of the complaint.

William G. Bussey, for plaintiff and appellant.

Jacobs & Sink, for defendant and respondent.

Present, J. F. DALY and VAN HOESEN, JJ.

Per Curiam.—The plaintiff utterly failed to show any agreement by the defendant to pay the interest which had, at the time of the conveyance, accrued upon the mortgage. The evidence on that point is the following:

Mr. Mudgett, the plaintiff's agent, swears that "Rinaldo said he could not raise money enough to pay his interest, taxes and assessments, and we agreed to take a note for the taxes and assessments. He was to pay his interest at the time the deed was executed. The interest was overlooked and none of us thought any thing about it."

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On cross-examination he was asked if the defendant, in any conversation with him, actually agreed to pay the accrued interest?

A. He did, sir.

Q. When was it?

A. It was previous to passing the title; after the contract was made; and even after the deed was passed I saw him about it.

Q. What did he say?

A. Well, he said he would have to see Mr. Jacobs; Mr. Rinaldo agreed to pay the interest on that property, also the taxes and assessments.

By the Court — You say he promised to pay the interest before the deed was delivered and afterwards?

A. Yes.

Q. What did you say to him after the deed was delivered?

A. "After I discovered the interest had been overlooked I went to Rinaldo and told him we had made a mistake;" "well, then," says he, "I will have to see Mr. Jacobs about that, and I will call and see him in a few days; you can call to see him;" "Jacobs said he would stand suit."

This is the only evidence of any agreement by defendant outside of his written contract of sale, and the deed delivered in pursuance of it.

The contract does not provide for the payment of interest upon the mortgage accruing at the time of the delivery of the deed.

There is nothing in the case from which we can infer an implied promise on the part of the defendant to pay such interest. The plaintiff having failed to establish a cause of action the complaint was properly dismissed.

Judgment affirmed.

NOTE.—A similar question in regard to an assignment of a leasehold interest came up in *Hull agt. Stevenson* (18 Abb. [N. S.], 196), wherein it was sought to apportion rent. The New York marine court, trial term, held, in that case, that accruing rent is not an incumbrance, yet, that the

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assignee was entitled, upon the principle of subrogation and equitable apportionment, to be allowed for the rent up to the time of the transfer. The general term of that court (JOACHIMSEN, ALKER and MCADAM, JJ.) reversed the trial term, holding that where a person takes an assignment of a lease he enters into the place of the lessee and takes the premises subject to the accruing rent (*citing Graves agt. Porter*, 11 Barb., 592), and that rent was not a debt or charge until it was due and payable, and that there was no implied covenant to pay rent which had accrued, but was not yet due and payable, where the instrument was silent in that regard, and that there could be no enforced apportionment in such a case. [Ed.]

SUPREME COURT.

THE PEOPLE *ex rel.* CHARLES KERBER *et al.* agt. THE CITY
OF UTICA, &c.

Assessment for repairing sewers—the provisions of the statute as to local assessments, to be strictly construed and followed. •

The provisions of the statute in relation to the levy and collection of local assessments must be strictly construed and followed.

Where, by the city charter, it was provided as follows : Section 108 of the Utica city charter as revised in 1862 (*chap. 18, Laws of 1862*) which provides for the repairing of sewers, and the expense arising under that section is to be assessed and collected in the same manner as the expense of *constructing* a sewer is assessed and collected. The assessment and collection of the expense for the construction of sewers is provided for by second subdivision of section 99 of the charter, which directs that three disinterested freeholders of the city shall be appointed by the common council to assess the expense of constructing sewers :

Held, that where the assessment was made by three individuals who do not appear to have been appointed assessors, nor do they appear to have been freeholders, as required by sections 99 and 108 of the charter, the assessment should be set aside and annulled.

Oneida County, Special Term, November, 1879.

THIS was a return made by the city of Utica, &c., to a common law writ of *certiorari* issued to review the proceed-

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ings of said city and its officers in levying a local assessment to pay the expense of repairing a sewer. The facts are stated in the opinion.

Linsley & Dunmore, for relators.

J. Thomas Spriggs, for respondents. •

NOXON, J.—Upon the complaint of Charles Kerber and others, presented to a special term of the supreme court, held at Utica, Oneida county, December 31, 1877, a writ of *certiorari* was issued, directed to the city of Utica and the common council thereof. The writ commanded the parties to whom it was directed to certify a copy of the proceedings of said council in relation to a sewer in Whitesboro street in said city, the expense of repairing and relaying the same, and the assessment levied for the expense thereof. The complainants claim that the proceedings of the council in relation to the assessment, prior to its levy, and in making the assessment were erroneous, irregular and illegal, and in disregard of the city charter. A return and amended return to the writ were thereafter made in obedience to the command contained in the writ, and an order of special term requiring an amendment thereto.

The argument upon the questions raised, upon the return to the writ, was made before the court at special term.

It appears, from the return, that at a meeting of the common council of the city, held on the 17th day of April, 1877, a resolution was adopted authorizing and directing the street commissioner to repair and relay a portion of the sewer in question, as might be necessary to put it in good order; the judgment of the council being that the work could not be judiciously let on contract; the expense of doing the work to be assessed upon the property benefited, in accordance with the provisions of the city charter. Thereafter, and on August third, the council certified that the relaying and repairing had

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been finished, and adopted a resolution appointing three freeholders to assess the cost of repairing and relaying the sewer.

On August seventeen the following resolution was offered, as appears by a copy of the proceedings of the common council, of that date, printed in the official paper of the city, signed by the city clerk, and made a part of the return, to wit:

Resolved, That the assessment for the construction of sewers in State and Whitesboro streets be annulled, and that George Ralph, John Bennett and Michael Barrigan be appointed assessors to assess the same.

This resolution does not appear, by the record of the council, to have been passed or adopted, although in the return outside the record it is stated that said assessors were appointed, and that they were "known to us to be three disinterested freeholders of the city of Utica to assess, and that a resolution to that effect was duly adopted." The statement in the return as to what took place at that meeting outside the regular proceedings of the council, which were had and taken at the meeting, and incorporated into the minutes by the clerk, cannot be taken into account. The record must govern. The resolution, as offered, does not appear to have been voted upon or adopted; nor does it appear, by the resolution or from any thing else in the minutes of the proceedings of the council, that the three men whom the return, outside of the record, states to have been appointed were freeholders. It is certified that the persons named in the resolution made the assessment; that the roll was signed and filed by the proper officers; and that a duplicate was signed and delivered to the collector for collection. The proceedings were taken under section 108 of the Utica city charter as revised in 1862 (*chap.* 18, *Laws of 1862*), which provides for the repairing of sewers; and the expense arising under that section is to be assessed and collected in the same manner as the expense of *constructing* a sewer is assessed and collected.

The assessment and collection of the expense for the construction of sewers is provided for by the second subdivision

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of section 99 of the charter, which directs that three disinterested freeholders of the city shall be appointed by the common council to assess the expense of constructing sewers. The rule is too well settled to require citation of authorities, that the provisions of the statute, in relation to the levy and collection of local assessments, must be strictly construed and followed.

In this case the assessment was made by three individuals who do not appear to have been appointed assessors, nor do they appear to have been freeholders, as required by sections 99 and 108 of the statute. The assessment should be set aside and annulled, with costs.

SUPREME COURT.

S. HOPKINS KEEP agt. LESTER KEEP.

Reference — when should not be ordered — Long account.

A reference should not be ordered where the issue is properly upon an agreement and its performance, although upon the issue of performance the plaintiff may be called upon to prove the payment of many items of expense, as he cannot recover upon them.

Where there is an important question of fact to be determined before the matter of the account will become one of importance, a reference should not be ordered.

Second Department, General Term, December, 1879.

E. New, for respondent.

P. & D. Mitchell, for appellant.

BARNARD, *P. J.*— The complaint in this action avers that the defendant, being the owner of certain premises in Brook-

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lyn, agreed with his son, the plaintiff, that if he, the plaintiff, would pay all the household expenses during the life of defendant and his wife, and the life of the survivor, the premises should belong to the plaintiff.

The complaint further avers that the plaintiff expended over \$5,000 in executing this contract when he was prevented from further execution by defendant giving a deed thereof to his second wife.

These averments are denied by the answer. The issue is, therefore, properly upon the agreement and its performance. If there was such an agreement, and it was performed, the plaintiff's case is made out without reference to the amount of the expenditure. The case is not one involving a long account. It involved no account in the sense which calls for a reference under the statute. It is true, that upon the issue of performance, the plaintiff may be called upon to prove the payment of many items of expense but he cannot recover upon them.

They are only incidentally involved and are not the thing for which the action is brought.

In case the action was technically referable, a reference should not be ordered, in view of the important question of fact to be determined before the matter of the account became one of importance. This question ought to be tried by a jury unless the parties consent to a reference. A compulsory reference should not have been ordered and the order should be reversed with costs and disbursements.

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SUPREME COURT.

THE PEOPLE *ex rel.* HATZEL agt. THE BOARD OF SUPERVISORS.

Election law — right of the board of aldermen to judge of the election of its own members — when writ of mandamus to compel county canvassers to send back returns or statement to ward inspectors for correction should not be allowed.

The board of county canvassers are only to send back the returns to the town or ward inspectors, when it shall clearly appear to them that certain omissions have been made, or that any mistakes, which are merely clerical, exist.

Where the relator, who asks for a *mandamus* to compel the county canvassers to send back the returns to the ward inspectors for correction, in his affidavit alleges matters which, assuming them to be true, show that there is no clerical error in the case, but that there has been a false and fraudulent alteration of the returns:

Held, that if the returns have been fraudulently altered the inspectors or others who have made such alterations are criminally liable for their wrongful acts; but the question whether such fraud has been committed cannot be properly tried in a proceeding to compel the canvassing of the votes.

In an action in the nature of a *quo warranto* the court can go behind the certificates of inspectors and canvassers, and the voter can be examined as a witness to prove for whom he cast his ballot. But in a proceeding to compel the canvassing of the votes, where the officers to whom the writ is to be directed are merely ministerial officers, deriving their powers solely from the statutes, and having no power to examine witnesses to enable them to get at the real truth, the granting of the writ would be useless and nugatory.

Although inspectors of election are guilty of an irregularity in not complying with the law which makes it the duty of inspectors "to securely paste or attach to each statement of the canvass one ballot of each kind found to have been given for the officers to be chosen at the election," &c., &c., as provided in section 54 of the act of 1872 (*chapter 875*), such an irregularity cannot be availed of by one who does not show himself to have been injured thereby.

To entitle a party to a writ of *mandamus* two things must appear: First, that he has a legal right to have something done by the party to whom he seeks to have the writ directed, and which has not been done; and, secondly, that he has no specific legal remedy to which he can resort to compel the performance of that duty.

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Accordingly, *held*, that as the relator will have an opportunity of contesting the right of his opponent before the board of aldermen, and by the charter such board is made the judge of the election returns and qualifications of its own members, subject, however, to the review of any court of competent jurisdiction, thus giving the relator, if aggrieved, a remedy at law, a *mandamus* will not lie.

Held, further, that as this application is made to the court within twenty-four hours of the time fixed by the board of canvassers for their final adjournment, and to issue the writ might work great injustice and cause increased expense, the elementary rule should be followed, that the writ should not be issued where the party has not a perfectly clear legal right to demand that for which he asks.

Special Term, November, 1878.

THIS is a motion for a *mandamus* to compel the board of supervisors, acting as a board of county canvassers, to send back to the ward inspectors the returns, or statements, for correction and a recanvass.

L. C. Waehner, for plaintiff.

W. C. Whitney, for defendant

LAWRENCE, *J.*—The motion for a *mandamus* should be denied, for these reasons:

First. I do not understand it to be alleged by the relator that his name appeared upon any or either of the ballots which he alleges that the inspectors of the eleventh election district of the eighth assembly district, unlawfully neglected to paste or attach to the statement of the canvass, in said election district. In the absence of such an averment, it is impossible to see how the relator has been injured by the omission of the inspectors to comply with the provisions of section 54 of the election law. It was the duty of the inspectors, under that section, to securely paste or attach to each statement of the canvass one ballot of each kind found to have been given for the officers to be chosen at the election, and to have stated "in words at full length immediately opposite such ballot, and written partly on such ballot and partly on the paper

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“to which it shall be pasted or attached, the whole number of
“all the ballots that were received which correspond with the
“one so pasted or attached, so that one of each kind of the
“ballots received at such election for the officers then to be
“chosen, shall be pasted or attached to such statement,” &c.
(*See act of 1872, chap. 675*).

The inspectors were, therefore, guilty of an irregularity in not complying with the law in this respect, but such an irregularity cannot be availed of by one who does not show himself to have been injured thereby, and this the relator fails to do. He simply alleges the omission of the inspectors to comply with the provision of the statute, and then proceeds to set out the form and language of the ballot, which the inspectors actually attached to their return, which ballot bears the name of George Hall, who was the principal opponent of the relator, as appears by the affidavit before me, and also the name of the relator.

The affidavit then goes on to state that four other persons, to wit, Joseph P. Strack, Bernard Kenney, Julius Hoffman and Louis Hock were also candidates at the election in said district for the office of alderman, and avers that Strack received seventy votes, Kenney eighty-five votes, and Hoffman and Hock four votes each. No elector, under the existing law, can vote for more than two aldermen in each of the senate districts, and as the relator does not allege that his name was on any of the ballots which were cast for either of the other four candidates, and as his name does appear on that cast for George Hall, the presumption must be, in the absence of an averment to the contrary, that such ballot was the only one which bore the name of the relator.

Second. The law provides that, if upon proceeding to canvass the votes, it shall clearly appear to the canvassers that in any statement, produced to them, certain matters are omitted in such statement which should have been inserted, or that any mistakes which are clerical merely exist, they shall cause the said statement to be sent by one of their number (who

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they shall depute for that purpose) to the town or ward inspectors, and town or ward canvassers from whom they were received to have the same corrected, and the said canvasser so deputed shall immediately proceed and give notice to the town or ward inspectors and canvassers, whose duty it shall be forthwith to assemble together and make such correction as the facts of the case require, but such town or ward inspectors and canvassers shall not, at such meeting, change or alter any decision before made by them, but shall only cause their canvass to be correctly stated, and the board of county canvassers are authorized to adjourn from day to day, for the purpose of obtaining and receiving such statement, such adjournment not to extend beyond three days (1 *R. S.*, pp. 134, 135, sec. 15, *Edmond's ed.*).

The relator relies upon this section as entitling him to the writ which he asks the court to grant in this case, but I think that he fails to bring himself within its provisions :

1st. The canvassers are only to send back the returns, when it shall clearly appear to them that certain omissions have been made, or that any mistakes, which are merely clerical, exist.

I must assume in this proceeding, that it does not clearly appear from the return of the inspectors to the canvassers that any mistakes, which are merely clerical, exist, because it is shown by the relator's affidavit that the canvassers, by a vote of fourteen to one, out of fifteen members present, resolved to canvass the statement, and as to the omission to attach the other ballots to the return, as I have above shown, the relator cannot ask for a *mandamus*, because he fails to aver that his name was on either of those ballots.

2d. There is nothing before me showing that there is any clerical error in the return, within the meaning of the statute, as I construe it. The relator alleges that, on the night of the election, it was announced by the inspectors that ninety-three votes had, in the district in question, been cast for the relator, and that Hall had received 130 votes, and that he, the relator, was so informed by a United States inspector of elections

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who attended at the poll, and that a statement to that effect was delivered to a patrolman on duty at the polling place, which statement is on file with the chief of the bureau of elections. The return made by the inspectors to the canvassers shows that Hall received 200 votes and the relator twenty-three.

Assuming this to be true there is no clerical error in the case, but there has been a false and fraudulent alteration of the returns. And although it is not alleged as the ground for the relator's application distinctly, I take this to be the real charge which he makes, because, in another part of his affidavit, he alleges that said statements appear, upon their face, to have been altered and bear evident erasures, but still indicate, as an inspection will show, that the votes originally returned for Hall were 130, and for the relator ninety-three in number. In an action in the nature of a *quo warranto* the court can go behind the certificates of inspectors and canvassers, and the voter can be examined as a witness to prove for whom he cast the ballot (*People agt. Cook*, 8 *N. Y.*, 67; *People agt. Pease*, 27 *N. Y.*, 45; *People agt. Vail*, 20 *Wend.*, 12; *People agt. Seaman*, 5 *Denio*, 409).

But in a proceeding of this nature where the officers to whom this writ is to be directed are merely ministerial officers, deriving their powers solely from the statute, and having no power to examine witnesses to enable them to get at the real truth, the granting of the writ would appear to be useless and nugatory. If the returns have been fraudulently altered the inspectors, or others who have made such alterations, are criminally liable for their wrongful acts, but the question whether such fraud has been committed cannot be properly tried in a proceeding to compel the canvassing of the votes.

3d. As the fifty-seventh section of the election law requires that within twenty-four hours after the several statements have been subscribed they shall be delivered by the inspectors to the clerk of the board of supervisors, the county clerk and chief of the bureau of elections; and as the fifty-ninth section provides that the remaining ballots not pasted or attached to

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said statements shall be destroyed by the inspectors, in the absence of any proof to the contrary, the presumption arises that the ballots referred to in the relator's affidavit have been destroyed, and that it would be impossible for the inspectors or canvassers to comply with the relator's demand, even if the writ should be granted.

Again, the relator does not assert in his affidavit that the formal statements required by said fifty-seventh section of the statute to be filed with the county clerk and the chief of the bureau of elections differ from the statement delivered to the board of supervisors by the inspectors. The statement alleged to have been delivered to the patrolman, and by him filed with or delivered to the election bureau, is nowhere alleged to be the statement required to be delivered by the inspectors to the chief of such bureau.

Third. The relator will have an opportunity of contesting the right of his opponent before the newly-elected board of aldermen. By the charter the board is made the judge of the election returns and qualifications of its own members, subject, however, to the review of any court of competent jurisdiction.

In such a proceeding the facts can be inquired into and determined (*Charter of 1873, sec. 6, sub. 4; Laws 1873, ch. 335*).

Fourth. The action of the board of aldermen under the provision of the charter just adverted to, is subject to the review of any court of competent jurisdiction. This gives the relator, if aggrieved, a remedy at law, and in such a case *mandamus* will not lie (*People agt. Thomson, 25 Barb., 73; People agt. Supervisors Greene, 12 Barb., 217; People agt. Hawkins, 46 N. Y., 9*).

Finally. This application, as stated on the argument, is made to the court within twenty-four hours of the time fixed by the board of canvassers for their final adjournment. To issue the writ asked for at this late stage of the board's proceedings might work great injustice and cause increased expense, and while I do not intend to be understood as holding that, in a perfectly clear case, I should not exercise the

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power confided to the court to grant a writ of *mandamus*, I deem it more prudent and just, in the case at the bar, to follow the elementary rule that the writ should not be issued where the relator has not a perfectly clear legal right to demand that for which he asks (*People agt. Supervisors Chenango*, 1 *Kernan*, 563; *People agt. Easton*, 13 *Abbott* [*N. S.*], 159; *Reeside agt. Walker*, 1 *How.* [*U. S.*], 272, 289; *People agt. Green*, 1 *Hun*, 1).

The motion for a writ of peremptory *mandamus* is, therefore, denied.

SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* HATZEL
agt. GEORGE HALL.

*Right of the board of aldermen to judge of the election of its own members—
Courts no power to pass upon the question of title to office.*

Prior to 1873 the charter of the city of New York provided that each board of the common council should "be the judge of the election returns and qualifications of its own members" (*Laws of 1867*, vol. 1, page 875):

Held, that the decision of the board of aldermen in such cases could not be reversed or set aside by the court.

Held, further, that the change in the phraseology of the charter of 1873 does not give to the court the power, in an action in the nature of a *quo warranto*, to pass upon the question of title to the office of alderman where the board has declared in favor of such right.

The charter makes the judgment of the board the subject of review by any court of competent jurisdiction, or, in other words, it permits an appeal to a court of competent jurisdiction from the judgment of the board. But the judgment of the board cannot be reviewed in an action to which the board is not a party, and in which the record of that board is not before the court.

It is the office of the writ of *certiorari* to correct errors of a judicial character committed by an inferior tribunal or body, and that writ brings the record before the court for examination and review, and such writ should be returnable before the general term. In cases of this kind a

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circuit judge, in a circuit court, cannot sit as an appellate tribunal to review the judgment and decision of an inferior tribunal.

New York Circuit, October, 1879.

THE facts sufficiently appear in the opinion.

A. Schoonmaker, Jr., attorney-general.

L. C. Waehner, for plaintiff.

A. H. Purdy, for defendant.

LAWRENCE, J. — I have considered the motion which was pending when the court adjourned yesterday, to dismiss the complaint in this case, and I am prepared now to briefly state the conclusions at which I have arrived. The complaint alleges that on the 5th day of November, 1878, an election was duly held in the city of New York for the office of alderman for the sixth senate district in said city.

That on said day, and for several years prior thereto, the above-named plaintiff, Jacob A. Hatzel, was a citizen of the United States, and of the state of New York, and resided in said senate district.

That at said election the said plaintiff and the above-named defendant, and one Bernard Kenney, and one Joseph P. Strack, were candidates for election to said office.

That the said Bernard Kenney received 12,608 votes; said Strack, 12,415, and said defendant received 8,965 votes, and said plaintiff received 8,993 legal votes for said office.

That subsequently, and on or about the 6th day of January, 1879, the said plaintiff, Jacob A. Hatzel, presented his petition for, and demanded, a seat in the board of aldermen of the city of New York. That such proceedings were had in and by said board; that on or about the 20th day of May, 1879, the said board resolved and declared that said defendant was entitled to a seat in said board, and that said plaintiff, Jacob A. Hatzel, was not entitled to a seat in said board.

That on the 1st day of January, 1879, the said defendant

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usurped the said office, and has ever since usurped and withheld the same from said plaintiff.

Wherefore the plaintiff demands judgment that the defendant is not entitled to said office, and that he be ousted therefrom, and that the said Jacob A. Hatzel is entitled to, and to be put into, possession of the same, with costs.

The answer of the defendant admits the first, third and fifth division of the complaint, and admits that Bernard Kenney and Joseph P. Strack received the number of votes set forth in the complaint, and denies each and every other allegation in the complaint.

For a further defense the defendant alleges: That prior to the commencement of this action, in a proceeding commenced on or about the 6th day of January, 1879, by the said Jacob A. Hatzel, before the board of aldermen of the city of New York, against this defendant, for the purpose of ousting this defendant from his position as one of the aldermen of the city of New York, upon the same facts as set forth in the complaint, a trial was duly had before said board of aldermen, and that thereupon, and upon the said trial, the said Jacob A. Hatzel was duly represented by counsel, and defendant also represented by counsel, and that the said board of aldermen acquired jurisdiction of said proceeding, and thereafter, on or about the 20th of May, 1879, said board of aldermen duly adjudged and decreed that this defendant was duly elected a member of said board of aldermen, and that the said Jacob A. Hatzel was not elected, and this defendant sets up said decision and judgment and decree as a bar and defense to this action. The rest of the answer it is not necessary for me to state.

Prior to 1873, the charter provided that each board of the common council should "be the judge of the election returns and qualifications of its own members" (*Laws of 1857, vol. 1, p. 875*).

This provision is identical with the language of the tenth section of the third article of the Constitution of this state in respect to the powers of the senate and assembly, and, also,

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of the fifth section of the first article of the Constitution of the United States prescribing the powers of congress on the subject of the election and qualifications of its members.

The power confided by the provisions above referred to to congress and the legislature, is of a judicial character. In respect to that I will refer, although it is hardly necessary, to 1 *Kent's Commentaries*, page 243 (11th ed.). And from the decision of congress or of the legislature, in the case of a contested seat, there is no appeal, nor does an action, in the nature of a *quo warranto*, lie to test the title of the sitting member, or either of these members, to the office. As the language of the charter, prior to 1873, is the same as that employed in the Constitution of the United States and of this State, it would appear to be clear that the decision of the board of aldermen in such cases could not be reversed or set aside by the court; and such I understand to have been the opinion of this court in the case of *Mc Veany* agt. *The Mayor, &c., of New York* (1 *Hun.*, p. 37). The charter of 1873 provides that the board of aldermen shall "be the judge of the election returns and qualifications of its own members, subject, however, to the review of any court of competent jurisdiction."

It is claimed that this change in the phraseology of the charter gives to this court the power, in an action in the nature of a *quo warranto*, to pass upon the question of the title of the relator to the office of alderman, notwithstanding the fact that the board has declared in favor of the right of the defendant. I do not concur in this view. The charter makes the judgment of the board the subject of review by any court of competent jurisdiction, or, in other words, it permits an appeal to a court of competent jurisdiction from the judgment of the board; and, as has been already stated, the board, in determining between the rival claimants, acts judicially. This action is not an appeal from the judgment of the board of aldermen, and the members of that board are not made parties defendants. It cannot be said that the judgment of the inferior tribunal can be reviewed in an action to which

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the board is not a party, and in which the record of that board is not before the court.

It is the office of the writ of *certiorari* to correct errors of a judicial character committed by an inferior tribunal or body, and that writ brings the record before the court for examination and review. The general term, in the recent case of *The People agt. Nichols* (18 Hun, 533), has decided that such a writ should be returnable before the general term, and that decision entirely negatives the idea that in cases of this kind a circuit judge, in the circuit court, can sit as an appellate tribunal to review the judgment and decision of an inferior tribunal.

It was urged on the argument that as the granting of the common law writ of *certiorari* is discretionary, the construction which I have given to the charter of 1873 cannot be sound because the relator would not have an absolute right to the writ, and that the statute contemplates a review of the proceedings of the aldermen in all cases in which such review may be demanded. The answer to this position seems to be:

1st. That if the meaning of the charter is that a party who has been refused a seat by the board of aldermen is absolutely entitled to review the proceedings of the board, and a *certiorari* is the appropriate writ to obtain such review, the writ is statutory and the court would be bound to grant it.

2d. If the right to the writ is not absolute under the statute, it must be inferred that the court will exercise its discretion wisely and properly, and will not refuse to grant the writ in any case in which it is shown that the relator is entitled to it.

I think, therefore, that the defendant's motion to dismiss the complaint should be granted. As this is an important question, and as I wish to give the plaintiffs every opportunity to review my decision, I direct that the exception taken to this ruling shall be heard in the first instance at the general term, which will enable the relator to bring his case very speedily before that tribunal.

NOTE. — On appeal to the general term the exceptions were overruled, and judgment was ordered on opinion of LAWRENCE, J. [Ed.]

McDonald agt. Kountze.

SUPREME COURT.

ALEXANDER McDONALD agt. AUGUSTUS KOUNTZE and others.

Demurrer to complaint — Improper joinder of causes of action

A cause of action, arising out of a breach of contract on the sale of real estate, cannot be united in the same complaint with a cause of action arising from the wrongful conversion of personal property; nor can a cause of action for the latter be united with a claim for an *accounting* between principal and agent, or banker and his customer, with regard to dealings in money.

Special Term, December, 1878.

DEMURRER to complaint.

*Edward F. Brown, for plaintiff.**Alvin Burt and F. J. Fithian, for defendants.*

VAN VORST, J. — The pleader, who prepared the complaint in this action, seems to have an idea that, in one action, he may unite and try all his causes of complaint against his adversary, it matters not how different they are in character, or in what they may have originated.

The complaint contains eighteen sections, setting up, in some form, nearly as many different causes of action, some of which are entirely disconnected, others running into each other, several of which may not be united in the same complaint, as will appear from a slight examination of them.

The third and fourth sections, together, disclose a claim for a breach of contract, growing out of a purchase of real estate in the city of Chicago, by which plaintiff alleges that he sustained a loss to the amount of \$30,000.

The fifth section discloses a joint transaction between the plaintiff and defendants in "Little Rock stock," which

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resulted in a loss, in respect of which, plaintiff claims to have made a payment over and above his proportion of the loss.

Sections six, seven and eight set up a loan made by defendants to plaintiff of \$10,000 at usurious rates, and a compulsory purchase of lands located in Florida, at five dollars per acre, which land the plaintiff has sold at fifty cents an acre, the same being worth little or nothing in the market.

Section nine discloses that plaintiff was in the habit of leaving with defendants, as custodians for safe-keeping, bonds, stocks, life insurance instruments and other documents, and they were in the habit of redelivering same to plaintiff, on his order, until plaintiff refused to allow the usurious charges, when they refused.

Section ten alleges that plaintiff left with the defendants a mortgage on the property of Emma C. McDonald for \$27,500, together with divers shares of stock, as an inducement for the extension of "*paper*," made or indorsed by plaintiff, and some stock, as collateral security for a draft which is alleged to have been paid, and that they have wrongfully and fraudulently refused to deliver the stock to plaintiff.

Section eleven alleges that plaintiff left with defendants, as his bankers, for safe-keeping, many other securities which were wrongfully and fraudulently withheld by defendants, and have only in part been restored to plaintiff. Section twelve shows that several promissory notes, made by plaintiff, are in suit; in whose favor the suits are brought is not disclosed, but the notes have been paid.

Sections fourteen and fifteen disclose a claim growing out of a neglect and refusal, on the part of the defendants, to cancel of record, according to agreement, a considerable mortgage on Michigan pine lands, given as collateral security on a purchase of property in New York, by which plaintiff has been prevented from selling the land, and has sustained damages to the amount of \$75,000; the consideration on the purchase of the New York property having been furnished by one Emma C. McDonald.

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Now here are several distinct causes of action. There are claims for breaches of contract in relation to the purchase of real estate, for the recovery of moneys paid on losses in joint transactions in the sale of stocks, for redress against usurious agreements on the loans of moneys, for stocks and securities wrongfully and fraudulently converted, in respect to notes in suit, which are claimed to have been paid, and claims for damages arising from a failure to satisfy mortgages, all united in the same complaint, some arise in contract, some in tort and some from neglect and omission of duty.

Such of them as arose out of contract, it was proper to unite with each other, but these cannot be united with claims originating in tort.

That the Code distinctly forbids (*sec. 484*).

All the causes of action so united must belong to one of the subdivisions of that section.

A claim for damages resulting from a breach of contract on the sale of real estate cannot be united with a cause of action arising from the wrongful conversion of personal property.

Nor can a claim for the latter be united with a claim for an accounting in respect to transactions between a principal and agent, or banker and his customer, with regard to dealings in money.

The blending of legal and equitable jurisdiction in the same court has not, nor has the Code, worked a confusion of remedies.

That an agent can be brought to account with his principal for moneys and property received cannot be doubted. But in order to uphold such action it must appear that the transaction arose out of such relation.

It is, indeed, alleged in the complaint that the defendants are bankers, and that some of the transactions arose out of that relation. But that is not averred with respect to all the causes of action.

In section thirteen of the complaint, it is alleged that the defendants acted as bankers for the plaintiff, and received

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deposits of money from him. With respect to such moneys, and their disposition, if an accounting was necessary, the plaintiff would be entitled to an account. And so with respect to securities left with a banker. They might be demanded, and if their redelivery was improperly refused, an action at law for their recovery could be maintained, or if the dealings with respect to them involved an accounting, such accounting could be had.

But in respect to all the transactions mentioned in the complaint, they are not distinctly averred to be between the plaintiff and defendants as bankers and customer. Nor with respect to all of them can it be said that the relation of principal and agent existed. Some of the causes of action appear to be isolated and distinct transactions between the plaintiff and defendants, in respect to which each was to look out for himself, no confidential or trust relation being alleged to exist.

And to a cause of action against a banker for an accounting with respect to moneys, cannot be joined a claim for damages arising out of a wrongful conversion of personal property, or such as result from a failure to satisfy a mortgage.

The following cases bear upon the subject of the improper joinder of causes of action: *Furniss agt. Brown* (8 How. P. R., 59), *Petrie agt. Petrie* (7 Lans., 90).

There should be judgment for the defendants on the demurrer, with liberty to plaintiff to amend on payment of costs.

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NEW YORK SUPERIOR COURT.

DANIEL R. KENDALL, plaintiff, agt. HENRY P. NIEBUHR,
AARON B. WOODRUFF and others, defendants.

Mortgage — equitable lien — effect of — release of part of mortgaged premises.

K. conveyed to N. certain lands fronting on One Hundred and Twenty-first street, in the city of New York, at an agreed price. At the same time it was agreed between them that N. should erect eleven houses on said lands, and that K. should advance, from time to time, as the houses progressed, to N. certain moneys towards their erection, for which advances it was further agreed that K. should receive from it a mortgage on each of the eleven houses for one-eleventh part of the money so advanced. Afterwards, when part of the moneys so to be advanced had been paid, N. executed to K. a mortgage on the whole of said property to the amount of the advances that had then been made. This mortgage, it was agreed, should be held as security till all the advances should have been made, and till the eleven separate mortgages should be executed. Subsequently the whole of the agreed advances having been made, eight of the houses were sold by N. to various parties (among them the premises in question), on each of which, except the premises in question, the respective purchasers executed a mortgage (which was transferred to K.) for the proportionate amount advanced by K., who thereupon released his prior mortgage as to such house. N. also executed like mortgages on the remaining three houses, whereupon K., in like manner, released his lien as to those, so that the entire prior mortgage was released, except as to the house in question, and that was sought to be charged only for its proportionate amount of such advances under the first mortgage. The conveyance of the premises in question was recorded in August, 1878. It was made subject "to two mortgages on said premises, amounting in the aggregate to the sum of \$5,000." The first of the said two mortgages was one for \$4,000, which is not in question here, and there was no other mortgage except the one in question on this house. In September following the conveyance in question, the last of the agreed advances was paid. The purchasers of the house in question claim: 1st. That the releases executed by K. of the ten other houses operated as a discharge of their house. 2d. That the receipt by him of the ten separate mortgages on the other houses, which, in the aggregate, were for a larger sum than the original mortgage, but were less by the sum which was the proportionate share of the premises in question, and which is sought to be recovered of the advances made, if the last payment made subsequent to the date of the deed to the

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grantees of the premises in question was deducted from the aggregate amount of said ten mortgages.

Held, that the mortgage was a valid and subsisting lien on the premises in question for the amount claimed, to wit, the proportionate amount of the advances made, deducting the amount of the last payment on account of the advances from the aggregate of the separate mortgages, and deducting the remainder from the general mortgage left the sum claimed as due.

The general rule that after alienation of a part of the mortgaged premises the remainder becomes primarily liable for the whole mortgage and that the portions alienated are liable only in the inverse order of alienation, and then only to the extent remaining due when the premises precedently liable have been exhausted is *fully recognised*.

But the rule of charging lands in the inverse order of alienation or holding a portion remaining apparently covered by a mortgage discharged in consequence of the release by a mortgagee with notice of other portions which were primarily liable is a *mere* rule in equity. The release to a subsequent purchaser is not a technical discharge of the lands previously conveyed. Neither is it an equitable release or discharge, unless upon the principles of natural equity and justice it ought thus to operate.

A mortgagee is not bound, at his peril, to ascertain if the mortgaged premises have been aliened or mortgaged subsequent to his mortgage before releasing a part of the mortgaged premises. Recording a conveyance is not notice to him; it is notice only to *subsequent* purchasers in good faith and for a valuable consideration.

Where a mortgagee, before releasing part of his mortgage security, employs an attorney to search the title and prepare the release and such attorney found of record certain conveyances, such knowledge is equivalent to knowledge by the mortgagee even if the attorney failed to communicate such information to his client.

R., under his contract with N. was compellable to execute the release upon recovering the separate mortgages. The record of the mortgage covering the whole of the eleven houses was notice to the purchasers of the premises in question of a lien which, under certain circumstances, might have been enforced against this lot for its entire amount. If they had not notice of the contract between K. and N., they were put upon their inquiry in regard to it and by due diligence could have ascertained its terms.

The contract between K. and N. constituted an equitable mortgage and gave K. in equity an equitable lien which could be enforced against subsequent purchasers to the extent actually due under it.

Special Term, October, 1879.

Kendall agt. Niebuhr.

William McDermot, for plaintiff.

Edward P. Flint, for defendants Woodruff, Conklin & Bayer.

FREEDMAN, J. — This is an action for the foreclosure of a mortgage to the extent of a balance of \$1,770 claimed to be still due upon it. The mortgage originally covered a number of lots, but foreclosure is prayed for only against a certain lot owned by the defendants Woodruff, Conklin & Bayer, who are the only litigating defendants.

The questions involved are somewhat novel and interesting, as well as complicated, and in consequence thereof they received special attention.

On the 6th of October, 1877, Daniel R. Kendall made a deed to Niebuhr of a number of lots on One Hundred and Twenty-first street, in the city of New York, presenting a frontage on said street of 187 feet, and received from Niebuhr the latter's bond and mortgage on said lots for \$29,920, which was the purchase-price. Contemporaneously therewith the said parties entered into a written contract whereby Niebuhr agreed to erect on said lots eleven houses, each of the dimensions of seventeen by forty-five feet, as therein provided, and to have them completed before May 1, 1878, and whereby Kendall agreed to make advances, as follows, viz:

"When all the houses are enclosed, girders and posts in cellar, leaders connected with sewer, bridging done, window frames in, coping on roof, and chimneys, skylight and scuttle on, the roof on all completed, an advance to be made on each house of \$1,200.

"When floors are laid, studding, browning and scratch coating done, sewer connections made, grounds or jambs set for doors and windows in all the houses, \$500.

"When the hard finishing and trimming is done, stairs up, sashes hung and glazed, mantels in, brown stone stoops completed, and doors all hung in all the houses, \$600.

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"When said houses are fully completed, including warming apparatus, grates and mantels, flagging and all yard work done, front and rear, in each house, \$750."

The contract further provided as follows, viz: "For each of the above advances the said Kendall agrees to receive the bond and mortgage of the said Niebuhr, with the signature of his wife, payable on or before May 1, 1878, with interest at seven per cent, and usual interest, tax, assessment and insurance clause, provided all the said houses and lots are free from all grants, mortgages, liens, judgments or otherwise, at the time the said payments are due. Interest on all said mortgages mentioned in this agreement, with cost of drawing and recording the same, and all taxes and assessments then confirmed, to be taken out of last mentioned payment. On the final completion of all of said houses, the said Kendall agrees to receive the bond and mortgage (containing usual clauses) of said Niebuhr for \$5,770 on each house and lot—being \$2,720 for the cost of the lot and \$3,050 for the advance making together \$5,770—payable, with seven per cent interest semi-annually, in one year if negotiated with an incorporated company, or three years if otherwise; the said Niebuhr to make the said bonds and mortgages payable to such parties as the said Kendall may direct. The said Kendall hereby agrees (the said mortgage for \$5,770 having been recorded) to remove and cancel all other mortgages mentioned in this agreement, provided that each of said houses and lots are free from all incumbrances by grants, mortgages, liens, judgments or otherwise. The said bond and mortgage for \$5,770 each to be divided at the option of said Kendall into two mortgages in aggregate for the said sum of \$5,770," &c., &c.

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On May 16, 1878, the following state of facts existed :

Kendall had advanced to Niebuhr the first two installments called for by the contract, amounting, in the aggregate, to.	\$18,700
Which, with the price of the lots, viz	29,920
Made the sum of	<u>\$48,620</u>
Niebuhr had executed to the New York Life Insurance Company eleven mortgages, one on each house and lot, and each for \$4,000, for which Kendall had received the money upon a surrender, as may be assumed, of his purchase-money mortgage	44,000
This left a balance due to Kendall of	<u>\$4,620</u>
Kendall then made to Niebuhr the third advance called for by the contract, amounting to	6,600
Which made the balance due to Kendall on that day	<u><u>\$11,220</u></u>

For this amount the mortgage in suit was executed by Niebuhr and wife, and the same was duly recorded May 17, 1878, as in the complaint alleged. It was made payable July 1, 1878, and covered the entire premises, subject, however, to the eleven mortgages held by the New York Life Insurance Company. From the description of the premises which was used it does not appear into how many lots the 187 feet of ground described were laid out, but at the end of the description the following provision occurs: "In case of foreclosure of this mortgage all to be sold in one parcel, or in single lots, at option of said Daniel R. Kendall."

Kendall also testified that it was further agreed that this mortgage was to be held by him as security until he got his final mortgages, namely, eleven second mortgages of \$1,770 each, and that upon the receipt of those it was to be discharged.

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Niebuhr then went on with the erection of the houses, and the last payment under the contract, amounting to \$8,250, was made to him by Kendall after the 26th of September, 1878.

As the houses neared completion Niebuhr made attempts to effect sales, and by October, 1878, he had sold eight of them with the land upon which each stood, respectively. Among them was one which was sold to the defendants, Woodruff, Conklin & Bayer, by deed recorded August 23, 1878, and upon conditions which will be specially noticed hereafter. As to the other seven, each house and lot was sold subject to a first mortgage of \$4,000, held by the New York Life Insurance Company, and the purchaser in each case, as a part of the consideration paid, executed a second mortgage for \$1,770, which was turned over to Kendall. Upon each of the three houses and lots remaining unsold, Niebuhr executed and delivered to Kendall a second mortgage for the same amount.

The ten mortgages thus received by Kendall were, by agreement between him and Niebuhr, applied in repayment of the last advance of \$8,250 made by Kendall under the contract and then in payment to the extent of \$9,450 of the mortgage of \$11,220.

Upon the receipt of each of the said ten second mortgages, Kendall released the premises covered by it, respectively, from the lien of the general mortgage.

The consequence of this course of dealing was that in October, 1878, every house and lot had been released, except the one purchased by the defendants, Woodruff, Conklin & Bayer, against which the general mortgage constituted a lien to the extent of \$1,770.

To foreclose that mortgage to the extent named against said premises, the present action was commenced in April, 1879.

Woodruff, Conklin & Bayer, as already stated, purchased the house and lot in question in August, 1878. The deed to them bears no date, but it was recorded August 23, 1878.

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For a consideration therein expressed of "one dollar (and other good and valuable consideration)" it conveys the premises in question subject "to two mortgages on said premises amounting in the aggregate to the sum of \$5,000." By their answer they admit that this sum had reference to the mortgage of \$4,000, held by the New York Life Insurance Company, and to the proportionate one-eleventh share of the principal sum of the mortgage of \$11,220, and they also admit the option secured to Kendall by the last-mentioned mortgage as to the manner in which, in case of foreclosure, the sale is to be made.

They insist, however, (1) that the plaintiff has precluded himself from enforcing the mortgage against the house and lot in question for the amount of \$1,770, or any amount whatever, because the ten releases executed by him, operated as a discharge of their house and lot from the lien of the mortgage, and (2) that in any event the receipt of the ten second mortgages operated as a payment and satisfaction of the mortgage of \$11,220.

As to the first ground: The general rule undoubtedly is, that when a mortgagor sells a portion of the lands which the mortgage covers, those which he retains become primarily liable for the satisfaction of the debt, and that those which he has conveyed are answerable only for an eventual deficiency, and, as a necessary consequence, that a similar equity prevails between purchasers, so that distinct parcels or lots of the mortgaged lands, which have been conveyed at different times to different purchasers, are chargeable in the inverse order of their alienation, and must be sold in that order under a decree. The equities which may thus have been created between a purchaser and the mortgagor, or between several purchasers, the mortgagee, when he has a knowledge of the facts, is not permitted to disregard or to disturb, and, with this knowledge, he acts at his own peril when he releases from the lien of the mortgage any portion of the lands which it embraces. If the lands released are primarily liable, and are of sufficient value

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to satisfy the debt, those previously conveyed are wholly discharged, and in no case can they be charged with any larger sum than the proportion of the debt that may remain unsatisfied when the value of the lands released has been applied and exhausted (*Howard Ins. Co. agt. Halsey*, 4 *Sandf.*, 565; *affirmed*, 4 *Seld.*, 271; *Gouverneur agt. Lynch*, 2 *Paige Ch. R.*, 300; *Schuyler agt. Teller*, 9 *Paige Ch. R.*, 173).

The existence of this equity does not depend upon the nature or extent of the consideration received by the mortgagor for his conveyance, or by the mortgagee for his release, but, before the obligation arises on the part of the mortgagee to regard it, his conscience must be affected by knowledge of the facts upon which the equity depends, or by notice sufficient to put him upon inquiry (*Stuyvesant agt. Hall*, 2 *Barb. Ch. R.*, 151; *Guion agt. Knapp*, 6 *Paige Ch. R.*, 35).

The mortgagee is not bound, at his peril, to ascertain whether any of the mortgaged lands have been aliened or subsequently incumbered, when applied to to release part of the lands bound by his mortgage, nor is the recording of the mortgagor's deed to the purchaser notice to the mortgagee of the fact of the conveyance, because, by the terms of the statute, the constructive notice, which arises from the recording of a conveyance of real estate, is limited to subsequent purchasers in good faith, and for a valuable consideration of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded (*Howard Ins. Co. agt. Halsey*, 4 *Seld.*, 271; *Stuyvesant agt. Hall*, 2 *Barb. Ch. R.*, 151).

In the case at bar it sufficiently appears that Kendall not only had sufficient notice to put him upon inquiry, but also knowledge of the conveyance to Woodruff, Conklin & Bayer. According to his own testimony he retained, before accepting the ten mortgages, William McDermot, an attorney, to make the necessary searches and to prepare the releases; and McDermot did make the searches, found the conveyances on record and in due time informed Kendall of the result. True, Kendall says that he cannot recollect that he was informed of the

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conveyance to Woodruff, Conklin & Bayer, specifically, and that he did not pay much attention to whom the houses and lots had been sold. But the deed to Woodruff, Conklin & Bayer having been duly recorded the presumption is that McDermot, in the discharge of his professional duty, found it with the rest, and this presumption became conclusive by the omission of McDermot, when called as a witness, to give testimony to the contrary. This being so the knowledge which McDermot had, as attorney, before the delivery of the releases, was, in law, equivalent to knowledge on the part of Kendall, even if the facts were not communicated to Kendall (*Bank of the U. S. agt. Davis*, 2 Hill, 451; *Ingalls agt. Morgan*, 10 N. Y., 178 [pp. 184, 185]; *Dillon agt. Anderson*, 43 N. Y., 231 [p. 238]; *The Distilled Spirits*, 11 Wall., 356; *Bank for Savings agt. Frank*, 56 How. Pr., 403 [p. 414]).

If, therefore, the case at bar fell within the general rule stated, I should reopen the case for the purpose of ascertaining the order of the alienation of the different houses and lots, of which there is no evidence, and their value at the time of their respective release, as to which I excluded testimony. But I do not think that the case falls within the rule, and, consequently, the pursuit of inquiry in the directions mentioned is immaterial. For the same reason it is immaterial whether, in October or November, 1878, there was, or was not, any thing due by Niebuhr to Woodruff, Conklin & Bayer for materials or other things supplied on all or some of the houses, or whether or not there were taxes upon the house and lot purchased by them at the time of the purchase.

The rule of charging the lands in the inverse order of their alienation, or of holding a portion remaining apparently covered by a mortgage discharged in consequence of the release, by the mortgagee with notice, of the other portion which was primarily liable, is a mere rule in equity. The release to a subsequent purchaser is not a technical discharge of the lands previously conveyed from the lien of the incumbrance.

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Neither is it an equitable release or discharge, unless upon the principles of natural equity and justice it ought thus to operate against the party making the release to the subsequent grantee (*Patty agt. Pease*, 8 *Paige Ch. R.*, 278).

In all the reported cases in which the general rule has been enforced against the mortgagee, the latter, when applied to to release part of the lands covered by his mortgage, was at liberty to grant or refuse the application. In the present case the release of the ten houses and lots was not a voluntary one, but one which, under the contract, Kendall was bound to give. If he had refused, Niebuhr or his assigns could have compelled it by action. Nor is the remaining house and lot sought to be held for more than, by the terms of the contract, it was liable for as its equal proportion of the price of the lots and the moneys advanced to build the houses. Both the contract and the mortgage of \$11,220 were anterior to the deed taken by the litigating defendants, and a portion of the money advanced after the delivery of the said deed was expended in finishing the house bought by them. The record of the mortgage of \$11,220, to which Woodruff, Conklin & Bayer took subject, was notice to them of the existence of a lien, enforceable under certain circumstances, against their house and lot to the extent of the whole sum named in it; and though they may not have had actual notice of the precise amount due, or claimed to be due, under it, nor of the terms of the contract, yet, by the exercise of due care and diligence, they could readily have obtained the necessary information. Moreover, within the principles laid down in *Payne agt. Wilson* (74 *N. Y.*, 348), and wholly independent of the fact that it was agreed that Kendall should have the right to hold on to the mortgage of \$11,220 until he got all the mortgages to which he was entitled, from which fact it may be inferred that the intention of the parties was that said mortgage, in case of partial payment, should be kept alive to cover subsequent advances under the contract, not otherwise secured, up to the amount named in it, the contract itself

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constitutes an equitable mortgage, and, in equity, a specific lien upon the houses and lots which, unless released in fact, can be enforced by Kendall against any of the subsequent purchasers from, or creditors of, Niebuhr to the extent of the amount actually due under it.

Under these circumstances Kendall has the prior equity, and it would be inequitable to enforce the rule referred to against him.

As to the second ground: Upon this branch of the case the testimony is, that in about the month of October, 1878, a settlement took place between Kendall and Niebuhr, in the course of which Kendall accepted the ten mortgages referred to (1) in satisfaction of the amount of \$8,250, advanced by him under the contract subsequent to the mortgage of \$11,220, and (2) in payment of the sum of \$9,450 on account of the last mentioned mortgage. It certainly was competent for the parties to make this settlement, which was not only fair and equitable in itself, but according to contract; and specific application having been made in the course thereof, the court cannot step in and say that a different application must be made. Woodruff, Conklin & Bayer not only took, as they admit, subject to the proportionate share of the house and lot under the mortgage, without ascertaining the amount of such share, while the record of the mortgage charged them with notice of its existence as a lien to the possible extent of \$11,220, but, for reasons already given, they also took subject, whether considered as subsequent purchasers from, or creditors of Niebuhr, to the equitable mortgage and specific lien in equity of Kendall under his contract, and all that at a time at which the house purchased by them was in an unfinished state. Much that has been said in the discussion of the first point is also applicable to this branch of the case, but to avoid unnecessary repetition it is sufficient to say that the case is not one in which a subsequent debt has been tacked to the original mortgage and in which that mortgage, with the debt thus tacked on, is sought to be enforced

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beyond the amount specifically secured by it against subsequent *bona fide* purchasers or creditors for value.

My final conclusion is, that, in any aspect of the case, the plaintiff has the prior equity as against the litigating defendants, and that he is entitled to the usual judgment of foreclosure and sale as prayed for in the complaint.

SUPREME COURT.

IN the Matter of the BOSTON, HOOSIC TUNNEL AND WESTERN RAILROAD COMPANY agt. THE TROY AND BOSTON RAILROAD COMPANY.

Railroads — Commissioners to ascertain points of intersection — when will be appointed — their powers and duties.

Where a railroad corporation desires to cross or intersect the railroad and grounds of another company, and they cannot agree upon a compensation or mode of crossing, upon a petition showing such facts, which are undenied, the petitioners are entitled to an order for the appointment of commissioners to determine the points and manner of crossing (*Laws of 1850, chap. 140, sec. 28, subd. 6*).

If the objection to such application be that the need of a crossing may be avoided by another location, proceedings should be taken under section 23 of the railroad act to change the route.

The language of the statute is, that the commissioners shall decide "the *point* and *manner*" of the crossing, thus necessarily committing some discretion to them as to the *spot* of the crossing and the *mode* of its accomplishment.

Special Term, November, 1879.

APPLICATION for the appointment of commissioners to determine the "points and manner" of crossing the track of the Troy and Boston Railroad Company.

James Gibson and *E. W. Paige*, for the application.

R. A. Parmenter, Esq. Cowen and *John H. Peck*, opposed.

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WESTBROOK, J. — *The Matter of the Buffalo and Lockport Railway Company agt. The New York Central and Hudson River Railroad Company* (15 Hun, 365), covers, as it seems to me, the present application. That case decides that when a railroad corporation desires to cross or intersect the railroad and grounds of another company, and they cannot agree upon a compensation or mode of crossing, upon a petition showing such facts, which are undenied, the petitioners are entitled to an order for the appointment of commissioners.

By necessary implication, also, that case likewise determines that if the objection to such application be that the need of a crossing may be avoided by another location, that proceedings should be taken under section 22 of the railroad act to change the route. As that has not been done, that point cannot now be raised.

The inconvenience to the Troy and Boston Railroad Company, and the damages sustained by it, if such crossings are made, are for the commissioners to determine. The right to cross is given, by statute, and if, as is claimed by counsel opposing this application, no right to such crossings for the purpose now asked for exists, that question can be raised better upon the report of commissioners which must determine "the point and manner of such crossings and connections," than now.

The language of the statute is, that the commissioners shall decide "the *point* and *manner*" of the crossing. This must necessarily commit some discretion to them as to the *spot* of the crossing and the *mode* of its accomplishment. The report will show exactly what will be done, and how the Troy and Boston company will be affected, and with these facts before the court, it will be in a better position to decide whether or not the application asked for should be granted than it now is.

This is not an application to take land, but to cross. It is true that in crossing, land is occupied, as in every such case it must be, and the fact that the Troy and Boston railroad is so located at the point of crossing as to make a Y cannot defeat the application for such crossing. The needs of such

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company for the land used in crossing must necessarily appear before the commissioners, for only by proof thereof can compensation be fixed. The statute gives the right to cross, and it would seem that the only mode of prevention is to compel a relocation of the road, as the statute directs, or a repeal or change of the law itself. At all events, the evidence which must be presented to the commissioners to fix the damages must also give to the court, when the report comes up for confirmation, such knowledge of the needs, inconvenience and damage to the Troy and Boston Railroad Company as will enable it to decide, if it has such power at all, whether the crossing should be allowed or not.

As the Troy and Boston Railroad Company has a perpetual lease of the Troy and Bennington railroad, and the former company has failed to agree with the applicant as to the crossings, there can be no objection to the granting of the order. If the necessary steps have not been taken to foreclose the rights of the Troy and Bennington Railroad Company they can hereafter be enforced, when the property reverts to its possession.

The maps produced on the application sufficiently comply with the statute.

N. Y. MARINE COURT.

NEIL MCCALLUM *et al.* agt. PHILIP BARNARD.

Arrest—after surrender by his bail entitled to be discharged by tendering new bond similar to first—When and when not compelled to give limit bond—Code of Civil Procedure, sections 575, 591, 149, 110, 574.

A defendant arrested and subsequently surrendered by his bail, is entitled to be discharged upon tendering a new bond similar in form to the one first given. The sheriff cannot compel him to give a limit bond before execution, except it be a case wherein bail to pay the debt is required.

Special Term, December, 1879.

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THE defendant, who was arrested on the 27th day of July, 1878, by virtue of an order of arrest, gave bail for his appearance when required (*Code of Civil Procedure, section 575, sub. 3*), and was thereupon released from custody.

On the 14th day of October, 1878, his sureties surrendered him (*id.*, *sec. 591*), and to relieve himself from actual confinement he gave a limit bond conditioned that he would not depart from the county, the sheriff declining to accept the ordinary bond for his appearance (*under sec. 575, sub. 3*), claiming that after such surrender he could take no other than a limit bond (*Id.*, *secs. 149, 110*). The action is at issue, pending and undetermined, and the defendant asks leave to withdraw the limit bond (which he claims was wrongfully exacted from him), and to substitute in its stead bail for his appearance (*under sec. 575, sub. 3, supra*), to the end that he may enjoy the liberty of going where he pleases until condemned by a jury of his country.

G. H. Alexander, for motion.

Vanderpoel, Green & Cumming, for sheriff.

D. & P. Mitchell, for plaintiff.

MCADAM, J. — A defendant surrendered by his bail is returned to all the disadvantages of the original arrest, but is in like manner restored to whatever privileges belonged to it, one of which was the right of being discharged upon giving the ordinary bond for his appearance under section 575, subdivision 3 of the Code of Civil Procedure. After such surrender the defendant is, as before, imprisoned "by virtue of the order of arrest," and by no other process. The surrender is not an act which justifies the sheriff in exacting from the unfortunate prisoner any thing more than the order warranting his confinement directs, but is merely the mode by which the bail exercise a discretionary right of terminating their

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liability. Prior to the new Code a defendant surrendered by his bail was entitled to his discharge by substituting new bail (*see Code of Procedure, sec. 188, sub. 1*), and there is nothing in the new Code taking away this right. The option of giving a limit bond, conferred by the new Code (*secs. 574, 149, 110*), was designed to enlarge and not to lessen the rights of the prisoner, and was especially intended to apply to those cases wherein the defendant was required but was unable to furnish bail to pay any recovery had in the action (*sec. 575, sub. 2*). The old Code furnished no relief to a defendant unable to procure such bail, while the new Code permits such a defendant to give a bond for the limits (*sec. 574, id.; Levy agt. Kaim, 55 How. Pr., 136*), and declares that it may be given even after surrender (*secs. 149, 110*). The present action not being one in which bail to pay the debt could or can be required, it follows that the sheriff had no right to exact the limit bond by means of which the defendant has been ever since confined within the limits of the jail. He was entitled to his discharge upon giving the less penal obligation, *i. e.*, a bond for his appearance when required.

I will, therefore, direct that if the defendant surrenders himself to the sheriff in exoneration of his bail upon the limit bond (*Code of Civil Pro., sec. 591; Croker on Sheriffs, sec. 590*), that the sheriff accept from him a bond for his appearance, in the form required by section 575, subdivision 3 (*supra*), and that he discharge the defendant from custody. This course will avoid the necessity of formally deciding whether the bond was voluntarily given by the defendant in exercise of a right of election, or whether it was coerced by the sheriff, *colore officii* (2 *R. S.*, 286, *sec. 59*; 3 *R. S.* [6th *ed.*], *p. 448, sec. 49*).

Glen's Falls Paper Company agt. White.

SUPREME COURT.

THE GLEN'S FALLS PAPER COMPANY agt. WILLIAM H. WHITE.

Arrest — What is a fine or penalty as used in subdivision 1 of section 549 of the Code of Civil Procedure.

In an action brought to recover a debt owing the plaintiff by an association, upon the statute making the trustees of the association who fail to file a report liable for the debts of the association :

Held, that, the liability to pay such debt is not a fine or penalty in the sense in which those terms are used in subdivision 1, section 549 of the Code of Civil Procedure, so as to subject the party to arrest.

To subject a party to arrest the cause of action must be a fine or penalty, and not something of a penal character.

Saratoga Special Term, December, 1879.

I. & C. M. Mott, with *S. S. Brown*, for motion.

Leon Abbett and *G. H. Crawford*, opposed.

POTTER, J.— This is a motion for an order to arrest the defendant.

The action is brought to recover of the defendant a debt owing the plaintiff by the Evening Mail Association for paper, upon the statute making the trustees of an association who fail to file a report liable for the debts of the association.

It must be assumed, upon this motion, that the report filed by that association was not a full compliance with the law, and that the defendant has become liable to pay the debt due from the association to the plaintiff, in consequence of such default.

The plaintiff contends that the liability to pay such debt is a penalty, and that an order of arrest may issue under subdivision 1, section 549 of the Code of Civil Procedure. Plaintiff relies mainly upon the case of *Merchants' Bank* agt. *Bliss* (35 N. Y., 412) to support that view.

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The question in that case was, which statute of limitations was applicable to a liability of the trustees of an association failing to file the report required. The court held that the limitation of three years applied to this kind of liability, under subdivision 2, section 92 of the Code of Civil Procedure. That subdivision has relation to an action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this state, &c.

It was held in that case that the action should have been commenced within three years.

Is this liability a fine or penalty in the sense in which those terms are used in subdivision 1, section 549 of the Code of Civil Procedure?

The definition of a penalty found in Bouvier is, "a pecuniary punishment; a sum of money imposed by statute to be paid as a punishment for the commission of a certain act."

Generally, if not universally, statutes imposing a penalty fix the amount of the penalty and prescribe who may bring the action, and how the sum recovered or the penalty should be disposed of.

It will be observed that the statute in question does not fix the amount, nor, in terms, prescribe who may bring the action. It simply makes all the trustees of a corporation jointly and severally liable for its debts if a majority of its trustees, with its president and secretary, fail to file a report in the form prescribed by the statute authorizing the formation of such corporation.

The object of the statute is manifest. It was to afford the persons associated for certain purposes, conveniences in the transaction of their business, and certain immunities and exemptions from personal liability incurred in such business, which, except for such incorporation, would attach to each of said associates. But the privilege was granted only upon the observance of certain conditions, one of which was the filing of an annual report showing the pecuniary condition and

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responsibility of the association, aside from the personal pecuniary condition of the association, which all persons dealing with individuals may easily ascertain.

In other words, the statute allows persons to incorporate, but will afford them no other immunity than partners enjoy, unless the persons composing the corporate association make their report and give the information prescribed. In this aspect it is not a penalty proper, but simply a provision retaining the common law liability of copartners or associates in business.

The case above referred to does not declare this liability a penalty proper, but calls it a penalty or a disability in that nature.

Similar language is used in many of the reported cases in relation to this liability.

The court, in *Whitney Arms Company agt. Barlow* (63 *N. Y.*, p. 67), use this language:

"But the statute is in one sense and for some purposes, as adjudged by this court, of a penal character in so far as it subjects the trustees to liability for the debts of the corporation."

To subject a party to arrest the cause of action must be a fine or penalty, and not something of a penal character.

I am not disposed to order the arrest of a citizen in a doubtful case or to strain a statute in that direction, certainly not to the extent of calling a debt a penalty for the sake of an arrest while the law has wisely and humanely abolished imprisonment for debt.

Motion denied, but as the question is new and has arisen from equivocal language in the decision of the courts it should be granted, without costs of motion.

Giraud agt. Giraud.

SUPREME COURT.

HARRIETTE F. GIRAUD agt. EUGENIE GIRAUD and others.

Will — invalid devices and bequests — Statute of limitations — Acquiescence — Estoppel — Accounting — Equitable conversion — when it fails.

Where a testator gave to his executors all his estate, real and personal, to hold the real estate during the joint lives of his *two* sisters, A. and E., and the life of the survivor, in trust, to receive the rents and profits of the *estate*, to sell the *personal* estate whenever they might deem it wise, and reinvest the proceeds as they might consider safe, and to pay four-fifths of the income of the *estate*, as the same should be received, unto the mothers and *three* sisters of the deceased, and the remaining four-fifths unto the testator's wife, and upon the further trust during the joint lives of the *two* sisters named, and the life of the survivor, to sell and dispose of the *real estate* and to receive and invest the proceeds, and that in case H., a sister of the testator, should marry and have children to pay one-fifth part of the *estate*, upon her death, to her children, and upon the further trust, upon the death of the mother and *three* sisters of the testator, to pay and transfer the other four-fifths, and the residue and remainder thereof unto the wife of the testator, and in case of her death to such person or persons as she might, by last will and testament, appoint:

Held, that the trust over four-fifths of the testator's estate and its proceeds being continued until the death of the mother and *three* sisters of the deceased was invalid, and the testator must be regarded as having died intestate with respect thereto, but that the gift of one-fifth of the estate to the children of the testator's daughter, H., was valid.

An action, commenced more than fourteen years after the will was admitted to probate, for its construction, and for an adjudication of its invalidity, is not barred by the statute of limitations, the *corpus* of the estate still remaining in the hands of the executors and trustees undistributed.

The plaintiff, a beneficiary under the will, was held not to be estopped from maintaining such action for the reason that she had acquiesced in the provisions of the will by receiving her proportion of the income according to its terms.

The omission by a party to assert a right from ignorance of it, does not conclude him. Silence and mere passivity cannot create an estoppel where

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the other party had equal knowledge of the facts and conditions in which their respective rights originate.

But, in the case above alluded to, the executors of the estate and the other beneficiaries under the will who had, with the plaintiff, received their proportion of the income, were held not to be liable to account for the same.

Where money has been paid with full knowledge of all the facts and circumstances under which it is demanded, it cannot be recovered back upon the ground that the party paying it rested under a mistake as to his legal rights and obligations.

Where there has been an equitable conversion of real estate into personalty for the purposes of a will, and the purpose is invalid as a whole or in part, the conversion fails "*pro tanto*."

Special Term, December, 1879.

By his last will and testament, made the 5th day of January, 1865, the testator, Ernest Giraud, after the payment of his debts, gave and devised unto his executors all his estate, real and personal, to have and to hold the real estate unto them and their successors during the joint lives of Adele and Eugenie, two sisters of the deceased, and the life of the survivor, in trust, however, to receive the rents, issues and profits of the estate, and to take charge of and manage the same to the best advantage, and pay all the taxes and charges thereon, to sell the personal estate, whenever they might deem it wise and prudent, and reinvest the proceeds in such other securities as they might consider good and safe, and to pay four-fifths of the net income of the estate, from time to time as the same should be received, unto Elizabeth Giraud, the mother of the testator, and his sisters Eugenie, Adele and Helene, the survivors and survivor of them, and the remaining one-fifth unto the testator's wife, the plaintiff in this action. And upon the further trust, during the joint lives of the testator's sisters Adele and Eugenie, and the life of the survivor, to sell and dispose of the real estate, and receive the proceeds, and reinvest the same in such securities as they might consider good; and upon the further trust, in case the testator's sister Helene should marry, and have issue, to pay

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and transfer one-fifth part of the estate upon her death to her children, their heirs and assigns forever, share and share alike; and upon the further trust, upon the death of the mother and sisters of the testator, to pay and transfer all the estate, except what was given to the children of his sister Helene, and all the rest, residue and remainder thereof unto his wife, her heirs and assigns forever, and in case of her death, to pay and transfer the same to such person or persons as she might by her last will and testament, duly executed, nominate and appoint, and in default of any such will, to pay and transfer the same unto her heirs or next of kin, according to the laws of New York regulating descents and disposition of the estates of intestates.

The testator nominated and appointed his wife Harriette, Henry I. Barby, and Theodore Gentil, executrix and executors of his will.

The testator left him surviving his widow, mother and the three sisters named in the will; the mother has since died.

On the 25th day of May, 1865, the will was duly admitted to probate by the surrogate of the county of New York, and letters testamentary were thereupon issued to Theodore Gentil, one of the persons named as executor in the will, who took possession of all the estate, real and personal, and has continued in the possession and control thereof ever since, and in pursuance of the powers contained in the will the real estate has been sold and the proceeds thereof have been received and invested as required by the will.

Out of the rents and issues the taxes and charges have been paid by the executor and the balance thereof has been paid to the several beneficiaries named in the will, according to their proportion, as is therein directed, with the knowledge of all the parties in interest. The plaintiff brought this action in the year 1879, and claims and demands that it be adjudged that the will is void, and demands an accounting from the executors.

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Charles N. Morse, of counsel, for plaintiff.

F. H. Churchill, of counsel, for sisters of the testator.

C. Edwards Tracy, of counsel, for executors.

VAN VORST, J. — As announced in the will, in the beginning thereof, the estate in the executors, to whom the property, real and personal, was devised and bequeathed in trust, was, as to the real estate, apparently limited to continue in them during the joint lives of Adele and Eugenie, two sisters of the testator, and the life of the survivor. Such limitation does not transgress the statute against suspending the powers of the alienation of property, real or personal, and the same observation applies to the power with which the executors were invested with respect to the sale of the real estate, which was to be exercised during the joint lives of the two sisters named and the life of the survivor.

With respect to the sale and conversion of his real estate the testator had, doubtless, the provisions of the statute in mind and designed to guard against any conflict with its terms.

But afterwards, and in the same connection, the duration of the entire trust is extended, and the estate and dominion of the trustees over four-fifths of the testator's property and its proceeds is continued until the death of the mother and three sisters of the deceased. That is during four lives.

It is only upon the deaths of all three persons that the estate, except the portion bequeathed to the children of the testator's daughter, Helene, is to be liberated from the trust, and is absolutely given to the widow of the testator, if living, and if dead, to the persons to whom, by her last will and testament, she should have given the same.

The intention of the testator to convert his real into personal property is clearly expressed in the will. This is shown

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by his absolute direction to sell and convey the same and to invest the proceeds.

But that it was the intention of the testator to make this conversion, and give to the objects of his bounty personal and not real property, does not avoid the conclusion, that as to at least four-fifths of his estate, the testamentary disposition is invalid (*Brewer agt. Brewer*, 11 *Hun*, 147).

The absolute ownership of personal property cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance, and until the determination of not more than two lives in being at the death of the testator (*Rev. Stat.*, part 2, chap. 4, title 4, secs. 1, 2).

The provisions, out of his estate, made by the testator, in favor of the children of his sister, Helene, I think, may be sustained, as the gift to them takes effect upon her death, and is not limited upon the lives of the other sisters, and that of the mother of the deceased. This provision may be readily separated from the residue of the trust estate, and may well stand. So soon as the children come into being, they take a vested interest, which becomes consummated upon the death of their mother.

The result to which we are led by this examination is, that the gift to the children of the testator's sister Helene is valid, and this bequest embraces one-fifth of the estate, but as to the remaining four-fifths of his estate, the dispositions thereof attempted to be made by the testator are invalid, and he must be regarded as having died intestate in respect thereof.

But it is urged by the counsel for some of the defendants, that this suit is barred by the statute of limitations. In this connection it is stated that the statute began to run immediately the will was proved, and that the cause of action accrued at that time.

It is quite true that the present action might have been commenced at the time suggested, which is nearly fourteen years ago. But, in truth, no rights have been lost by the defendant, and none gained by the plaintiff by an omission to

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bring this action before. The *corpus* of the estate, in its entirety, is still in the hands of the trustees for distribution, and I should hold that the right to ask for an adjudication upon the will, and for a decree as to the rights of the parties thereunder, or of those entitled to the estate yet to be distributed, may well be brought at any time before a division of the estate is actually made in pursuance of the terms of the will.

The statute, in such case, would not begin to run until distribution was actually made; nor do I think that plaintiff is estopped from asserting her claims in this regard, by acquiescence, as is also urged.

The plaintiff has made no representation, and performed no act by which she is concluded from asserting her legal and equitable rights to the principal of the estate.

Granted that she has, for several years, and ever since the death of her husband, believed the will to be good, the other parties, it seems, have rested under the same belief. But the belief of all rested upon the terms of the will, which was equally open to the examination of each. What the rights of the plaintiff and the other parties in interest were in the estate of the testator were questions of law and not of fact. And where the facts are undisputed, one who is ignorant of his legal rights, is not estopped by an admission of a conclusion of law (*Brewster agt. Striker*, 2 Coms., 19).

Omission by the plaintiff to assert a right from ignorance of it, does not conclude her. Silence and mere passivity, cannot create an estoppel where the other party had equal knowledge of all the facts and conditions in which their respective rights originate.

But although there is no valid objection to the plaintiff's claim to her portion of the *corpus* of the estate, which is still held by the trustees, upon the ground of the invalidity of the will, now first judicially declared, I do not think that her claim that the executors or the *cestuis que trust* named in the will shall account for the portion of the income and profits

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of the estate which has been paid to them, in pursuance of the terms of the will, before the commencement of this suit, upon the belief that they were valid, can be sustained.

It appears that the income, since the testator's death, has been collected and paid to the parties in the proportions, and as the will directs, within the knowledge of all the parties. There has been a general acquiescence on the part of all these persons in the lawfulness and propriety of these payments since the year 1865. All seemed to act, the executors and trustees in paying, and the beneficiaries in receiving, these moneys, upon the basis that the dispositions of the will were valid.

And for the purpose of protecting the trustees and shielding the beneficiaries from claims of the one upon the other, growing out of such payments, the will should be deemed what it was in good faith believed to be.

Under the belief that the will was valid it was clearly the duty of the trustees to collect the income and apply the same in accordance with the directions of the will; and the beneficiaries having acquiesced in such payment for such a period of time, their action in that regard should not, in equity, be made a subject of inquiry, but the same should be left in the condition in which it seems to have been, by common consent, placed by all concerned (*Roosevelt agt. Post, 1 Edw. Chy., 579*).

Laches of parties in applying for relief is not favored in equity; and results which have been reached through the consent of parties, and in which they have acquiesced for years, there being no fraud or imposition, are rarely if ever disturbed.

While on the one hand I do not think that the trustees could recover this money from the beneficiaries, so they are not liable to the beneficiaries, or either of them, on account thereof.

When money has been paid with full knowledge of all the facts and circumstances under which it is demanded, it cannot

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be recovered back upon the ground that the party paying it labored under a mistake as to his legal rights and obligations (*Clark agt. Dutcher*, 9 *Cowen*, 674; *Silliman agt. Wing*, 7 *Hill*, 159; *Wait's Actions and Defenses*, vol. 4, 486).

The provisions made by the will in favor of the testator's wife are declared to be in lieu of dower in his real estate, but as the bequests in her favor fail, her dower rights remain unaffected.

It has been already observed that the positive directions to the executors to sell amounted to an equitable conversion of the real estate into personalty, but it is to be borne in mind that such conversion was for the valid objects of the will, and where the object fails, the conversion to that extent also fails.

Where the object of the conversion is illegal, or fails wholly or in part, there is a resulting use or trust in so much of the property as is not legally or effectually disposed of, in favor of the *heirs* or *distributees* who would have been entitled to the same if the conversion thereof had not been directed by the will of the testator (*Hawley agt. James*, 5 *Paige*, 318; *Bogart agt. Hertell*, 4 *Hill*; *Betts agt. Betts*, 4 *Abb. N. C.*, 419 and cases there cited).

Having above decided that, as to four-fifths of the estate, the testator died intestate, such portion of the estate, being undisposed of, must be distributed among the widow and sisters of the deceased, and others entitled thereto, according to law.

The findings and judgment will define the specific interests of each.

Kipp agt. Delamater *et al.*

N. Y. SUPREME COURT.

JOHN P. KIPP agt. PETER DELAMATER *et al.**Consolidation of actions — when motion for, should not be granted — Mortgage foreclosure.*

Where three actions of foreclosure had been commenced, the defendants being the same in each, the mortgage in the first action covering fifty acres of land which, after the execution of this mortgage and the two mortgages affected by the second action, had been sold to L. D., one of the defendants; the two mortgages in the second action covered 150 acres, embracing the lands affected by the mortgage in the first action; the mortgage in the third action covered 100 acres, being part of the land affected by the mortgages in the first and second action, and excluding the portion sold to the defendant L. D.; on motion to consolidate the three actions:

Held, that the motion could not be granted for the following reasons:—

First. The authorities are against it (6 *Abbott's New Cases*, 69).

Second. The proceedings are, *in rem.* against different pieces of property, and there is no reason why one parcel should bear burdens in the way of costs which belong to another.

Third. Rights of individual defendants differ, and one defendant should not bear that which belongs to another.

Ulster Special Term, November 8, 1879.

MOTION to consolidate three actions of foreclosure.

The mortgage in the first action covered fifty acres of land, which, after the execution of this mortgage and the two mortgages affected by the second action, had been sold to the defendant, Lewis Delamater. The second mortgage in the second action covered 150 acres, embracing the land affected by the mortgage in the first action. The mortgage in the third action covered 100 acres, being part of the land affected by the mortgages in the first and second actions and excluding the portion sold to the defendant, Lewis Delamater.

The defendants are the same in each action.

Wright agt. Nostrand *et al.*

S. L. Magoun, for motion, cited sections 817, 818, 819, *Code of Civil Procedure* and 2 *Story's Eq. Jur.*, 1233.

Cornelius Esselstyn, for plaintiff, opposed, cited 2 *Wait's Pr.*, 555; *Grant* agt. *Spencer*; *Voorhee's Code* [6th ed.], 336, note *f*; *Thomas* on *Mortgages*, 268, 269; *Beck* agt. *Ruggles*, 6 *Abb. New Cases*, 69.

WESTBROOK, *J.*—I do not see how this motion can be granted.

1st. The authorities are against it (6 *Abb. N. C.*, 69). 2d. The proceedings are *in rem.* against different pieces of property; and there is no reason why one parcel should bear burdens, in the way of costs, which belong to another. 3d. Rights of individual defendants differ, and one defendant should not bear that which belongs to another.

Motion denied.

N. Y. SUPERIOR COURT.

BENJAMIN WRIGHT, receiver, &c., agt. ELBERT NOSTRAND *et al.*

Stenographer's fees — *What fees court stenographers are entitled to charge to counsel for furnishing an official copy of the stenographic minutes of a trial* — *Code of Civil Procedure*, sections 86, 289.

Court stenographers are only entitled to charge to counsel for furnishing an official copy of the stenographic minutes of a trial *ten cents per folio of 100 words by actual count*; and on application of the attorney he will be ordered to write out his minutes and make out his bill at such rate.

He cannot require an attorney to pay in advance for such copy.

Attorneys as well as stenographers are officers of the court and subject to its orders; and in any case where it should be made to appear that an attorney had wrongfully refused to pay the legal charges of the stenographer, the court will protect the latter by a summary order against the attorney.

Special Term, December, 1879.

Before SPIER, J.

Wright agt. Nostrand *et al.*

THIS is a motion to compel Henry W. Parkhurst, the official stenographer of the equity branch of this court to furnish to Messrs. Thomas & Wilder, the defendants' attorneys, a copy of his minutes of the trial of the action.

Edward P. Wilder, for motion.

Henry W. Parkhurst, in person, opposed.

By the motion papers it appeared that defendants' attorneys had ordered an official copy of the minutes, which the stenographer had refused to write out, unless paid the sum of ninety dollars, in advance, as his fees. The defendants' attorneys demurred to this charge as exorbitant and inquired of the stenographer at what rate per folio he computed his fees, and how many folios of testimony he had taken; to which Mr. Parkhurst had replied that his fees were computed at fifteen cents per folio, and that he did not know precisely how many folios there would be, but by a process of "estimating" the same from the original minutes, he "judged" there would be about 600 folios, which, at the rate of fifteen cents a folio, would amount to ninety dollars. The defendants' attorneys refused to pay this sum, but informed the stenographer that they would pay him at the rate of fifteen cents a folio of a hundred words by actual count, after the minutes should have been written out, but that they declined to pay in advance upon any process of "computation" less accurate than an actual account. This proposition not being acceptable to Mr. Parkhurst, the present motion was necessitated. And upon this motion counsel referred to sections 86 and 289 of the new Code, which it was stated on both sides embodied all the law applicable to the case. By section 86 it is provided that the official stenographer shall "furnish, upon request, with all reasonable diligence, to the defendant in a criminal cause, or a party or his attorney in a civil cause in which he has attended the trial or hearing, a copy, written out at length, of the tes-

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timony and proceedings upon the trial or hearing, upon payment by the person requiring the same of the fees allowed by law." It was contended by Mr. Wilder that the fees allowed by law in such cases were fixed by section 289 "at the rate of ten cents for each folio so written out." Mr. Parkhurst, on the other hand, contended that section 289 prescribed the fees only in cases in which the court should order the minutes, and stated that the usual practice of stenographers is to charge at the rate of fifteen cents per folio when the minutes were ordered by counsel. Judge SPENCER declined to take this view of the statute, declaring that "there was no mystery about it; that the legislative intent was obviously to fix the rate of stenographers' fees at ten cents a folio, and that Mr. Parkhurst must content himself with that rate of payment."

The judge, in like manner, overruled the suggestion made by the stenographer, that the Code nowhere provided that the number of folios should be actually "counted," Mr. Parkhurst urging that it was also the practice of official stenographers to "estimate" the folios instead of counting them. Mr. Wilder, in rejoinder, mentioned to the court a recent case in which a stenographer's bill had been reduced over one-third from its "estimated" amount, by the simple process of counting the folios.

The court thought that counting was the proper course.

It was also urged by the stenographer that he was entitled to payment of fees in advance, before he wrote out his minutes; and in justification of this plea he mentioned several instances in which attorneys, after ordering the minutes, had abandoned their appeals, and thus left the minutes on the stenographer's hands unpaid for; to guard against which result Mr. Parkhurst said he had adopted the uniform rule of requiring payment in advance in all cases. Mr. Wilder waxed quite indignant at this suggestion, and stated that, if the stenographer would say that he had ever had any difficulty in collecting from him or from his firm, Thomas & Wilder, any bill whatsoever of any kind, or would state that he had ever

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heard of anybody who had had such difficulty, he would deposit now in court a sum of money large enough to secure any possible bill Mr. Parkhurst could charge; but that he refused to pay any sum of money in advance upon speculation or conjecture as to what Mr. Parkhurst's bill might ultimately be.

The court again sustained Mr. Wilder, and ordered the stenographer to write out his minutes and make out his bill at the rate of ten cents per folio of 100 words by actual count, and to furnish the same to defendants' attorneys; adding, "that attorneys, as well as stenographers, are officers of the court, and subject to its orders; and that in any case where it should be made to appear that an attorney had wrongfully refused to pay the legal charges of the stenographer the court would protect the latter by a summary order against the attorney."

SUPREME COURT.

MARY A. BEST agt. ALEXANDER M. VEDDER.

Survivorship of actions—What actions do not survive against executors, &c.

Where an action was brought by plaintiff against the defendant, who was a practicing physician and surgeon, to recover damages alleged to have been caused by his improper and unskillful treatment of the plaintiff, who had sustained a fracture of the bones of her wrist and employed the defendant in his professional capacity to treat the same, and pending the suit the defendant died:

Held, that the action does not survive against the defendant's executors, the injuries alleged to have been sustained by the plaintiff being injuries to her person and not to her estate.

Pain and bodily injuries do not possess such transmissible qualities as to compel the living to atone for such as the dead inflicted, nor to entitle them to receive satisfaction for such as the dead suffered.

Schenectady Special Term, December, 1879.

Best agt. Vedder.

MOTION for leave to revive action against the executors of the defendant.

I. A. Dennison, for plaintiff.

S. W. Jackson, for executors.

LONDON, J.—The defendant, now deceased, was a practicing physician and surgeon. The plaintiff sustained a fracture of the bones of her wrist, and employed the defendant, in his professional capacity, to treat the same. Subsequently, she brought this action against him to recover damages, alleged to have been caused by his improper and unskillful treatment. Pending the suit, the defendant died. The question presented by this motion is, whether the action survives against the defendant's executors.

I think it does not. The injuries alleged to have been sustained by the plaintiff are injuries to her person, and not to her estate. The Revised Statutes (2 *R. S.*, 447, *secs.* 1, 2) provide that, for wrongs done to the property, rights or interests of another, an action may be brought against the executors or administrators of the wrong-doer, in the same manner, after his death, as in actions founded upon contracts, but provides that this right shall not extend to actions on the case for injuries to the person of the plaintiff.

It is immaterial whether we consider this complaint as charging a breach of contract or a breach of duty; whether in form *ex contractu* or *ex delicto*; in either case the injury alleged is to the person, and not to the estate of the plaintiff. In *Wade agt. Kalbfleisch* (58 *N. Y.*, 282), it was held that an action for breach of promise to marry does not survive. "The form of the action," says CHURCH, Ch. J., delivering the opinion of the court, "is not material. The controlling consideration is, that it does not relate to property interests, but to personal injuries." In *Zabriskie agt. Smith* (13 *N. Y.*, 333), DENIO, J., says: "It is now well settled that an executor or

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administrator cannot maintain an action upon express or implied promise to the deceased, where the damage consists entirely of the personal suffering of the deceased, whether mental or corporeal. Actions for the breach of a promise of marriage, for unskillfulness of medical practitioners, contrary to their implied undertaking, &c., are considered virtually actions for injuries to the person." In *Fried agt. The New York Central Railroad Company* (25 How., 285), MASTEN, J., remarks: "If, upon legal rules, injury to the person is the gist of the action, and injury to property or pecuniary interests is merely matter of aggravation, the right of action dies with the person; but if the gist of the action can be injury to property or pecuniary rights, the right of action is transferred to the personal representatives, who may recover to the extent that the wrong touched the estate."

The maxim that a personal action dies with the person, whether he did or suffered the wrong, seems to be founded upon the theory that executors and administrators only represent the estate of the deceased — that is, his debts and goods. If the estate has been diminished or injured by the wrong of another, to them is committed the duty of re-establishing the integrity of the estate committed to their care; or if their testator or intestate, by his wrong, injured the estate of another, so much may be taken of his estate, from the hands of his representatives, as shall suffice to make good to the injured party whatever has been wrongfully destroyed or subtracted. Pain and bodily injuries do not possess such transmissible qualities as to compel the living to atone for such as the dead inflicted, nor to entitle them to receive satisfaction for such as the dead suffered (*Chamberlin agt. Wilson*, 2 Maule & Sel., 408; *Bickham agt. Drake*, 8 Meeson & Wels., 854; *Stebbins agt. Palmer*, 1 Pick., 71; *Smith agt. Sherman*, 4 Cush., 408).

The motion is denied, with ten dollars costs.

Fleischauer agt. Doellner.

SUPREME COURT.

MARCUS FLEISCHAUER agt. JOHN F. DOELLNER and others.

Grantor and grantee — Covenant to pay a mortgage — When it cannot be released.

An oral agreement, made contemporaneous with the delivery of a deed of real estate, as between the parties, that the grantor would take a reconveyance of the property and release his grantee from covenants in the deed, should be clear in respect to its terms, and as to the contingencies upon which a reconveyance could be justly insisted upon, and should be made and carried out in good faith.

Where the grantee of the premises acknowledged his liability under the covenant in his deed to pay a mortgage upon the land, by paying to the mortgagee a part of the principal, and obtaining an extension of time to pay the residue, without the consent of the mortgagor, by which the mortgagor was released, and by thereafter paying interest on the balance due to the mortgagee and his assigns, and promises to pay the balance without reservation:

Held, that he could not thereafter obtain from his original grantor, under an alleged antecedent agreement, a valid release from his covenant to pay the mortgage.

Develin agt. Murphy (56 How. P. R., 326) distinguished.

Special Term, December, 1879.

Laurence & Waehner, for plaintiff.

Samuel Untermeyer and Albert Cardozo, for defendants.

VAN VORST, J.—I reach the conclusion, from a consideration of all the evidence, that contemporaneous with the execution and delivery of the deed by Doellner, the owner of the premises in the year 1873, to the defendant, Guggenheimer, there was a verbal agreement existing between the parties, by which the right was reserved to Guggenheimer, the grantee, to reconvey the property to Doellner upon certain contingencies; and that the conveyance made was subject to that agreement, and that the agreement, although not in writing, was a valid collateral engagement, which it was within the power

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of the parties honestly to carry out, although it might deprive a third party, not privy to the deed or agreement, of some rights, flowing from a covenant in the original deed, if allowed to stand.

It seems to me clear that the rights of such third party are in subordination to the equities of the principal persons growing out of their own agreement (*Devlin agt. Murphy*, 56 *How.*, 326).

That some such agreement was made at the time the deed was agreed to be taken, and was delivered, is established by the evidence of Doellner and Guggenheimer directly, and their evidence finds some corroboration from the fact that Shuster, who was then the owner of the mortgage, executed by Doellner, and which was a lien on the premises when he conveyed, and which Guggenheimer assumed and agreed to pay as part of the consideration for the conveyance, in 1875 or 1876, applied to Doellner to ascertain whether any such agreement was in existence.

Such inquiry would not be likely to have been made, unless Shuster had, in some way, heard of it; that his counsel advised him to make the inquiry, does not, in my judgment, break the force of such conclusion.

Such inquiry would be too exceptional, at that early day, although suggested by counsel, unless something had before then proceeded from Doellner or Guggenheimer, as to the existence of some agreement on the subject, which Shuster or his counsel had heard. In fact, Shuster testifies that there was some talk of such release; he had heard of it. But the material question is as to the terms of the agreement.

The testimony of Doellner is not full or entirely clear in respect to the details, and standing alone, would be too indefinite to warrant any opinion as to the contingencies upon which a reconveyance could be justly insisted upon, or as to its conditions.

Guggenheimer, on the other hand, gives what the general statement of Doellner fails to furnish.

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He says that, at the time he agreed to take the property from Doellner, he said, in substance, that he was taking it entirely upon what had been told him by one Simon; that he had not personally examined the property, and that the trade would not go through, unless Doellner made him a promise that, at any time, if the representations which had been made were not "*exactly so*," and unless he had, in such event, the privilege to make a return of the property, and deed it back, he, at the same time, accounting for any profits, which had accrued in the meantime; that Doellner agreed to this, and promised that he would, upon such reconveyance, release Doellner, upon his accounting, from all the covenants in the deed.

After the conveyance to him, Guggenheimer entered into possession of the property and received its rents and profits.

He put himself in personal communication with the holder of the mortgage and paid a portion of the principal due, and in effect changed the conditions of the mortgage by obtaining an extension of the time of making further payments.

He remained the owner of the property and received its rents from October, 1873, the date of the conveyance to him, until July, 1874, when he conveyed the same to Maria Simpson, subject to the mortgage.

It does not appear that he, at any time while he was the owner of the premises, made any complaint that any representations, upon the strength of which he had bought the property, were not true, or that he was dissatisfied with the property.

During this period sufficient time had elapsed to have enabled the defendants to learn whatever was needful to know with respect to the property.

The fact that he made payments of both principal and interest upon the mortgage, and had undertaken to convey it away, raises the presumption that he was satisfied with his bargain.

His absolute and unqualified conveyance to Maria Simpson,

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is entirely inconsistent with any remaining right in him to reconvey to Doellner.

In August, 1875, Maria Simpson deeded the premises to one Mary Jane Simpson, who, in July, 1876, conveyed the same to Isaac Mendelson, subject to the mortgage, and on the 4th of March, 1876, Mendelson conveyed the premises to Eliza, the wife of the defendant, Guggenheimer.

In July, 1879, Eliza, the wife of the defendant Guggenheimer, by deed, in which her husband joined, conveyed the property to the defendant, Doellner, and Guggenheimer received from him a release from the covenant contained in the conveyance of October, 1873, by which Guggenheimer had assumed to pay the mortgage. Without for the moment adverting to the evident want of good faith in that transaction, I must conclude that the release in question is wholly inoperative to discharge the defendant from his obligation to pay the mortgage, and that as to the plaintiff it has no force whatever.

After what had transpired between himself and the holder of the mortgage, his payments thereon, the extension obtained, and his unqualified recognition of his agreement to pay the same, and his repeated promises to do so, his continued possession of the property, and his receipt to his own use of the rents and profits, without objection, and the assertion of an absolute right to convey it to others, it was too late, he having thus recognized the claims of the owner of the mortgage, under his covenant to pay the same, to fall back upon and attempt to revive an anterior agreement, with his original grantor, to receive a reconveyance, which all the facts and circumstances show he must have waived or abandoned. And while Doellner was clearly not legally or equitably bound to accept a reconveyance and give the release, under the facts and circumstances lastly above alluded to, I do not think that he could voluntarily do so, to the prejudice of the rights of the holder of the mortgage. Doellner had, by the covenant of Guggenheimer to pay the mortgage, become a mere surety,

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and Guggenheimer the principal debtor, and the extension obtained by the latter, without the consent of Doellner, the surety, had the effect to release him from all claim in favor of the holder of the mortgage (*Calvo agt. Davis*, 73 *N. Y.*, 211).

In such condition, Doellner had nothing to release, and his attempt to do so seems a gratuitous attempt to deprive the plaintiff of his remedy against Guggenheimer, and its good faith may well be questioned. The want of good faith is made clear by what transpired when the release was given. This case is clearly distinguishable from *Develin agt. Murphy* (*supra*). The good faith of the parties in that case was not impeached. There was no accounting by Guggenheimer in any true sense. He proposed to account for the rents received while he was the owner of the property, but for some years, and while the property was held by his grantees, no accounting was had.

There are other features of this transaction to which, were it necessary, allusion might well be made, which tend further to show that it was hurried through, and the release secured to avoid the plaintiff's claim against Guggenheimer, theretofore distinctly asserted. The methods and expedients adopted should not receive favor in a court of equity. But enough has been said to establish that the plaintiff's claim against Guggenheimer is unaffected by the pretended release.

Doellner having been discharged by the extension, he is entitled to judgment in his favor, but as to Guggenheimer he is liable for any deficiency arising on the sale of the mortgaged premises, and judgment is ordered accordingly.

NOTE.—See note to *Develin agt. Murphy* (56 *How.*, 329); *Trustees, &c.*, agt. *Anderson* (30 *N. J. [Equity]*, 3 *Stuart*, 366); *Harby agt. Harrison* (24 *N. Y.*, 170); *Douglass agt. Wells* (57 *How. P. R.*, 378). [Ed.]

Pettit agt. Geesler.

MONTGOMERY COUNTY COURT.

JAMES H. PETTIT, appellant, agt. JOSHUA GEESLER, respondent.

Evidence — Parties — when cannot be examined as a witness "concerning a personal transaction or communication between the witness and the deceased person" — Code of Civil Procedure, section 829.

In an action for goods sold and delivered, where the defense was payment, the plaintiff being the survivor of the firm, the defendant cannot be allowed to testify over plaintiff's objections that he paid the bill in question to the deceased partner (*Code of Civil Procedure, sec. 829*).

And this, although the plaintiff, after testifying in his own behalf to the sale and delivery of the goods, also testified, without objection, that no part of the bill had ever been paid.

October, 1879.

J. D. & F. F. Wendell, for appellant.

D. S. Morrell, for respondent.

Z. S. WESTBROOK, *County Judge*. — This is an appeal taken by the plaintiff from a judgment rendered in justices' court, in favor of the defendant, on the verdict of a jury. Action to recover for a bill of goods sold; defense, payment.

The plaintiff is the survivor of the firm of Pettit Bros., formerly engaged in business as druggists at Fort Plain, which was composed of this plaintiff and Benson Pettit, deceased.

The firm of Pettit Bros. sold the defendant a bill of goods in June, 1874. This sale is undisputed in the case, and the defense is payment. The plaintiff is the owner of the bill and is survivor of the firm.

Upon the trial the justice allowed the defendant to testify over plaintiff's objections, duly made, that he paid the bill in question to the deceased partner, Benson Pettit, in the fall of 1874.

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The appellant urges that this evidence was not competent under section 829 of the Code of Civil Procedure.

The plaintiff stands in the character of both *assignee* and *survivor*, and I think the evidence is clearly within the letter and spirit of the prohibition of the section of the statute referred to.

The court of appeals repeatedly held such evidence inadmissible under section 399 of the old Code; and section 829 of the Code of Civil procedure, which was intended as a substitute for it, is still more comprehensive in its prohibition than that section of the old Code.

The learned counsel for the respondent contends that if this evidence comes within the prohibition of said section 829 of the Code, yet it is admissible because the plaintiff testified in the case that the bill had not been paid.

The plaintiff, after testifying in his own behalf to the sale and delivery of the goods, also testified, without objection, that no part of the bill had ever been paid.

This latter evidence was entirely unnecessary to establish plaintiff's case, as payment was an affirmative defense.

Upon proof of the sale and delivery of the goods the presumption arose that the price was due and unpaid, and remained until the defendant established otherwise.

The defendant testified that at the time he paid the bill to Benson Pettit no one else was present, and plaintiff does not pretend he was present or knows any thing about the transaction. On the other hand the plaintiff testified that at the time of the alleged payment Benson was not in the state.

Section 829 of the Code of Civil Procedure, referred to, provides that a party cannot be examined as a witness "concerning a personal transaction or communication between the witness and the deceased person," except where the * * * executor * * * or survivor * * * is examined in his own behalf * * * "*concerning the same transaction or communication.*"

That is, concerning the particular transaction in regard to

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which the executor or survivor testified, which, in this case, is the payment by defendant to Benson Pettit. What construction must be put upon the testimony of the plaintiff that no part of the bill had ever been paid? He could only testify as to his own knowledge. He could not testify to what did or did not occur between the defendant and deceased at the time alleged. It would be incompetent evidence, and he could not be convicted of perjury for testifying falsely concerning it. All the effect that can be given to that evidence is that the bill had not been paid to plaintiff, or to his knowledge. The plaintiff did not testify, or attempt to testify, in relation to the payment of the bill by the defendant to the deceased, which is *the particular transaction* in question.

He was not present and knew nothing about it, and claims that the deceased was away at that time. I think the justice erred in receiving the evidence of payment referred to, and, therefore, the judgment must be reversed.

Judgment accordingly reversed, with costs.

SUPREME COURT.

In the Matter of the Application of the ATTORNEY-GENERAL
agt. THE NORTH AMERICAN INSURANCE COMPANY.

Insolvent insurance company — Receiver's right to immediately receive the funds upon the conversion of the company's securities into money — Mandamus.

The general rule of law is that where a statute requires something to be done, and there is no specification of the time of performance, the duty required becomes a present one to be immediately performed.

Accordingly, *held*, that a receiver of an insolvent insurance company, appointed pursuant to chapter 902 of the Laws of 1869, when the securities of such company are converted into money, is entitled to the immediate possession of the same; and the superintendent of insurance cannot retain the moneys until the receiver is ready to distribute, but must pay them over to the receiver at once.

Albany Special Term, June, 1879.

Attorney-General agt. North American Insurance Co.

APPLICATION for a *mandamus* against the superintendent of insurance.

R. W. Peckham, for motion.

A. Schoonmaker, Jr., attorney-general, opposed.

WESTBROOK, J. — Henry R. Pierson, pursuant to chapter 902 of the Laws of 1869, was duly appointed receiver of the North American Life Insurance Company, and qualified as such in accordance with the order of appointment.

An actuary was also duly appointed as required by section 8 of said act, who, by a written report which has been confirmed by the court, declared that the securities, assets, credits and premiums of the said company were not sufficient, under the laws of this state, to pay all the policies, annuities and other obligations of said company as they would mature by the terms thereof, and the legal costs and expenses of the receivership.

In further pursuance of section 8 of this act, and under the joint direction of the superintendent of insurance, the state treasurer and the receiver, the securities of said company have been converted into money, which moneys, by the resolution of the board composed of said officers, were to be paid to the receiver when collected. A considerable part thereof has been heretofore paid to the receiver, but a large amount of money recently paid to the superintendent under the proceedings had in this matter he refuses to pay over to such receiver who asks the order of this court directing their payment to him.

There is no claim made that the moneys are retained for any improper purpose, but the attorney-general, on behalf of the superintendent, insists that the latter should retain the moneys until the receiver is ready to distribute. The point submitted is, who is now entitled to hold the moneys?

The answer to the question is contained in the act and

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section already referred to (*Chap. 902 of the Laws of 1869, sec. 8*). It is there provided that when the securities of the company are converted into money, such money "shall be paid to the said receiver on his giving his receipt to said superintendent," and the receiver is directed to pay out the same in the order and manner also therein clearly pointed out.

No reading of the statute allows the superintendent to delay the payment of the money to the receiver until the latter needs them for distribution, but its plain import is that the receiver is entitled to them immediately, for there is no authority given to the superintendent to hold them for an hour, but, on the contrary, he is directed to pay. The general rule of law is, that when a statute requires something to be done, and there is no specification of the time of performance, that the duty required becomes a present one to be immediately performed.

In the Matter of the Atlantic Mutual Life Insurance I have expressed the opinion that the provisions of this section of the act of 1869 are mandatory, in which the court of appeals has concurred. This motion is controlled by the same rule.

It follows that the application of the receiver for a peremptory *mandamus* must be granted.

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COURT OF APPEALS.

THE PEOPLE *ex rel.* THE MAYOR OF NEW YORK, respondent,
agt. SIDNEY P. NICHOLS, impleaded, &c., appellant.

The hearing, precedent to removal "for cause after opportunity to be heard," is judicial — Jurisdiction of special terms at chambers — Prohibition, writ of, when granted — office of the writ — Code, section 780, notice of enumerated motions less than eight days, by order of court — such order reviewable — Certiorari, hearing on return, a non-enumerated motion — Code, sections 17, 232, supreme court rules 87, 38, 44 — Practice.

The charter of the city of New York conferred upon the mayor the power to remove the relator "*for cause, after opportunity to be heard.*"

Held, the power is not an arbitrary one, and can be exercised only upon just and reasonable grounds, and after notice; that the proceeding for removal must be instituted upon specific charges, sufficient in their nature to warrant removal; that such charges, unless admitted, must be proven; that on such proceedings the party has a right to cross-examine the witnesses against him, and to call witnesses in his own behalf, and to be represented by counsel; that these conditions must be complied with before the power of removal is exercised :

Held, further, that such proceedings are *judicial* and subject to review by *certiorari*, issuing from the supreme court. The powers of the supreme court to be exercised by the judges in general term, circuit, oyer and terminer or special term are conferred by the Constitution, and cannot be limited either by the legislature or by any power conferred by it upon the court itself. One special term, or one judge at special term, can have no more authority or power than another.

Under section 232 of the Code of Civil Procedure, the justices of a judicial department may appoint the times and places for holding special terms. If, under this power, some terms are designated as "*special terms for equity cases and enumerated motions,*" and others as "*special terms for non-enumerated motions and chambers business,*" such designation, in so far as it limits the class of proceedings to be had at *any* special term, is subject to the control of the justice assigned to hold it. By designating a special term as one *for non-enumerated motions and chambers business*, the power of the judge presiding thereat cannot be limited. Such term would still be a special term, and the justice holding it would have all the powers of *any* judge holding *any* special term.

The power of the general term to grant a writ of prohibition addressed to the special term, is to be exercised in the same manner and to the same

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effect as when it is issued to inferior courts and magistrates, and the inquiry relates only to the jurisdiction. Error or mistake in practice affords no foundation for the writ, unless it involves doing something contrary to the general law.

There is no absolute right to a notice of eight days on enumerated motions.

A shorter notice may be prescribed by a judge or court, under section 780 of the Code, and rule 37 of the supreme court. The exercise of this power is subject to review.

Bringing on for hearing a *certiorari* upon the return thereto, is like a motion for judgment on the pleadings, on the ground that the answer raises no issue of fact, and it would present a question of law only. Such motion is of the class called *non-enumerated*, as defined by supreme court rule 88.

Rule 44 of the supreme court, which provides that a case on *certiorari* may be brought to a hearing "upon the usual notice of argument at special term," is controlled by section 780 of the Code, which authorizes the judges to prescribe a notice of less than eight days.

January, 1880.

It is thought the facts of case sufficiently appear in the opinion of the court. But for a full and detailed history of it, reference is made to *The Matter of Sidney P. Nichols* (57 How., 395); *The People ex rel. Nichols agt. Cooper* (*id.*, 463), and *The People ex rel. Cooper agt. Special Term at Chambers* (*id.*, 647), from the decision in which last case this appeal was taken, the court of appeals sustaining the decision of Mr. justice WESTBROOK at special term in the two former cases, and reversing that of the general term in the latter.

John D. Townsend, for appellant.

F. N. Bangs, for respondent.

DANFORTH, J.—This is an appeal from an order of the general term of the supreme court in the first judicial district, directing that a writ of prohibition should be issued to prohibit the special terms of the supreme court appointed to be held in the city of New York for "non-enumerated

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motions and chamber business, and the justices presiding thereat from proceeding to entertain any application for any judgment or order in any manner affecting the proceedings of the mayor of the city of New York in the removal of Sidney P. Nichols from the office of commissioner of police, in pursuance of a writ of *certiorari*, theretofore issued out of the supreme court to said mayor, and the return thereto, or either of them, and to prohibit the said Nichols from applying to any such special term for any judgment or order upon said writ." This order implies that the proceedings of the mayor in the matter referred to were subject to review in some one of the divisions of the supreme court, and that the writ of *certiorari* furnished the proper means to bring those proceedings before it. It therefore seems that the defendant had mistaken neither his remedy nor his forum, but erred only in respect to the time and place of his application for relief. But, upon this appeal, the respondent contends that the court had no jurisdiction to issue the writ of *certiorari*, and, therefore, that question is first to be considered.

The record shows that in May, 1876, the defendant, Nichols, was appointed commissioner of police. He accepted the appointment and entered upon the duties of the office. Its term was six years, and the annual salary \$6,000. It was thus an office of honor and profit, to the enjoyment of which he was entitled for the full term, unless removed for misbehavior or unfitness to discharge its duties. The relator was the mayor of the city, and its charter conferred upon him power to remove the defendant, but only "for cause and after opportunity to be heard" (*Session Laws of 1873, chapter 335, section 25*). The power is not an arbitrary one, to be exercised at pleasure, but only upon just and reasonable grounds, and then not until after notice to the person charged, for in no other way could he have "an opportunity to be heard." The proceeding, therefore, must be instituted upon specific charges, sufficient in their nature to warrant the removal, and then, unless admitted, be proven to be true. Defendant might also

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cross-examine the witnesses produced to support the charges, call others in his defense, and in these and other steps in the proceeding be represented by counsel. In no other way could the person sought to be removed have a due hearing or "an opportunity to be heard," and this condition must be complied with before the power of removal is exercised (*R. V. Smith*, 5 Q. B., 614; *Osgood agt. Nelson*, 5 House of Lords, 636; *People ex rel. Munday agt. Bd. Fire Com'rs.*, *infra*). It follows, therefore, that the proceeding is judicial in its character, and, as a necessary consequence, is subject to review by a writ of *certiorari* issued by the supreme court in the exercise of its superintending power over inferior tribunals and persons exercising judicial functions (*Leroy agt. The Mayor*, 20 J. R., 429; *People agt. Board of Police*, 39 N. Y., 506; *People ex rel. Folk agt. Board of Police of the City of Brooklyn*, 69 N. Y., 468; *People ex rel. Clapp agt. Board of Police of the City of New York*, 72 N. Y., 415; *People ex rel. Munday agt. Board of Fire Commissioners of the City of New York*, 72 N. Y., 445).

Various other questions have been argued, with great ability, by the learned counsel for the respondent, relating to the form of the writ of *certiorari*, and the effect of the order made by the mayor, whether it is interlocutory or final, but these need not be considered. They relate to the procedure under the writ of *certiorari*, and must be disposed of when that writ and the return thereto come before the court. They have no relation to the order before us; that, as its language shows, is quite narrow. The writ granted by it is to prohibit not all the special terms of the supreme court, but only particular special terms of that court, from entertaining further proceedings under the writ of *certiorari*, and the opinion of the learned court places the order upon distinct grounds, viz.: First. That a special term for non-enumerated motions and chamber business has no jurisdiction to hear and decide the *certiorari* proceeding; and, second, that such proceedings could only be brought on for hearing upon a notice of not less than

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eight days, and declares that the relator therein, at other special terms, and upon such notice, may bring them to a determination. It is, therefore, true, as the learned counsel for the respondent urges, that the exact "grievance of the appellant is not that he is wholly prevented from prosecuting the writ of *certiorari* and the proceedings under it, but it is that, in prosecuting it, he is restricted to particular branches of the supreme court."

Can this distinction be maintained? It is provided by the Constitution that the court itself shall have general jurisdiction in law and equity. It follows that its jurisdiction can be limited neither by the legislature nor by any power conferred by it upon the court itself (*Hart agt. Hatch*, 3 *Hun*, 375). Its functions are to be exercised by its judges, sitting in general terms, or at the circuit, or oyer and terminer, or special terms. The Constitution also provides that each judge may hold special terms in any county (*article 6, sec. 7*), and neither in that instrument nor in any statute do we find that one special term, or one judge at special term, has, or can have, more authority or power than another. The Code (*sec. 232*) authorizes the justices of the supreme court for each judicial department to appoint the times and places for holding the special terms. This authority was exercised in the first district. Some of the terms thus appointed are designated by the justices as "special terms for equity cases and enumerated motions," and others as "special terms for non-enumerated motions and chamber business," and, while it cannot be doubted that for the due and orderly conduct of litigation and causes, certain steps and proceedings therein may, under the discretion of the judge, be required to be taken at specified terms, yet any such regulation must be subject to the control of the justice who is assigned to hold them. If otherwise the power of the judge would be limited, public interests sometimes put in jeopardy, and the rights of citizens infringed. The case before us illustrates this position.

The writ of *certiorari* was, on the application of the relator

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Nichols, duly allowed in August, and made returnable at a special term of the supreme court, at the court-house in the city of New York, on the first Monday of September then next. This was one of the terms regularly appointed, but was among those designated "for non-enumerated motions and chamber business." After some delays a return was made to the writ, and filed on the 15th of September. On the sixteenth day of that month Mr. justice WESTBROOK, who was duly assigned to hold that term, made an order requiring the mayor to show cause at the special term, to be held in the court-house in the city of New York, on the twenty-second of September, why Nichols, the relator, should not have judgment on the return, vacating the judgment of the mayor removing the relator from his position as commissioner of police, etc., and directed, for reasons shown to him, that service on the seventeenth of September should be sufficient. The case was one of general importance, and the public as well as the relator had an interest in its speedy disposition. At this point, however, upon the application of the mayor, the order appealed from was made. The power of the general term to grant a writ of prohibition addressed to the special term was given by statute (*chapter 70, Laws of 1873*), to be exercised "in the same manner and with the same effect in all respects as in the like proceedings when the writ is directed to inferior courts and the judges thereof." In such cases the inquiry relates to jurisdiction simply. An error or mistake in practice affords no foundation for the writ unless, as is said in *Ex parte Smith* (3 A. & E., 719), it involves the doing of something "which is contrary to the general laws of the land" (*Acherly agt. Parkinson*, 3 M. & S., 427; *In re Crawford*, 13 Q. B., 613). It was decided that the court of queen's bench would not interfere with the procedure of other courts. In *Thompson agt. Tracey* (60 N. Y., 31), the court says: "No question but jurisdiction can be tried in a proceeding inaugurated by a prohibition."

It is also well settled that where a remedy by appeal or

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otherwise may be had to correct an error of law or practice, the writ will not lie (2 *Hill*, 263, 267). In such a case the inferior court or the tribunal of limited jurisdiction can be set right by appeal only. Where, however, the statute has imposed restrictions as to the circumstances under which such "inferior court or judge thereof" may act in matters otherwise within its jurisdiction and these restrictions are disregarded, the party aggrieved may have a remedy by prohibition. This is the doctrine stated in *Quimbo Appo agt. The People* (20 *N. Y.*, 531), and by Jacobs in the citation there made. It goes no further. The remedy may be had to prevent the violation of some fundamental principle of justice or the transgression of the "bounds prescribed by law." No other power is given to the general term by the statute cited. In other cases it acts as a court of review, and its functions in these two capacities ought not to be confounded.

The inquiry, then, is whether the justice who was holding the special term had mistaken the practice in a vital particular or was doing any thing manifestly outside of or beyond the jurisdiction of the court.

First. There is no absolute right to a notice of eight days. A notice of less than eight days may be prescribed by a judge or court. This power is conferred by statute, section 780, and recognized by general rule of the supreme court, No. 37, but its exercise is subject to review (71 *N. Y.*, 434).

Second. It was not improper to bring on the *certiorari* for a hearing at the special term at which the order to show cause was made returnable. It would be had upon the return, and, like motion for judgment on the pleadings on the ground that an answer raises no issue of fact, would present a question of law only, and thus come within the class of non-enumerated motions (*People agt. Northern Railroad Co.*, 42 *N. Y.*, 217, *as defined by rule 38*). It is not to be found among those styled in that rule as "enumerated motions;" but if it were otherwise it would still have been within the jurisdiction of the court to hear at any special term, and upon

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such notice as should be prescribed. There is nothing in the supreme court rule 44 to prevent it. By that rule it is provided that a case on a *certiorari* may be brought to a hearing "upon the usual notice of argument at special term." It is claimed that this rule has the force of a statute, and that the notice of the argument must, therefore, be of eight days. But the rule is binding only as it is consistent with the Code (*sec. 17*), and, as we have seen, the power to shorten notice is conferred by that statute.

There was, then, no violation of the provisions of any statute or unlawful exercise of jurisdiction by the justice holding the special term named in the order, nor would he have transgressed by entertaining further proceedings pursuant to the order to show cause.

I can discover no ground upon which the order appealed from can stand and think it should be reversed.

All concur.

SUPREME COURT.**THE MECHANICS AND TRADERS' NATIONAL BANK agt. THE MAYOR, &C., OF NEW YORK and others.**

Contract for regulating and grading street — Proviso in reference to liens — Claim of plaintiff under assignment — Lienors to be first paid.

Where a contract was made between one G. and the city of New York for regulating, &c., Eleventh avenue, and there was inserted in the contract a provision that the contractor should satisfy all liens for work or materials, filed with the commissioner of public works before or within ten days after the completion of the work, otherwise the city should be entitled to retain from any money due the said contractor a sufficient amount to satisfy such claims until the liabilities aforesaid shall be fully discharged, or such notice withdrawn; the plaintiff claims all the funds by *assignment of moneys due and to grow due*; the defendants R. and B. claim portions by equitable assignments or orders, other defendants claim by liens under the contract:

Held, that those lienors who filed their claims in accordance with the terms of the contract are entitled to be paid in the order in which the claims

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were filed, and the plaintiffs and such defendants as claim by assignment are not entitled to any interest in the funds in the hands of the city until such liens are satisfied.

The plaintiff, as the assignee of G., took the contract subject to all the equities existing between him and parties doing work and furnishing materials under the contract, or which, under the terms of the contract, lienors might enforce against him.

Special Term, December, 1879.

THIS is a contest between different claimants for a sum of money admitted by the city to be due on a contract for regulating, &c., Eleventh avenue, made by the defendant, Michael Gavin, November 1, 1875.

There is no contest as to the amount, the city conceding that there is due the sum of \$12,178, with interest from January 19, 1878.

There are three kinds of claims :

1st. The bank claims, by assignment of moneys due and to grow due, all the funds.

2d. The defendants, Jeremiah P. Russell and David S. Babcock, claim portions by equitable assignments or orders.

3d. The defendants, the Bigelow Blue Stone Company and Hazard Powder Company, and other defendants, by liens under the clause in the contract.

The city claims, under the contract, that it has a right to retain the moneys to meet the claims of the lienors, and is willing to pay those who have complied with the agreement.

The liens were acquired under the following clause in the contract :

"And the said party of the second part hereby further agrees that he will furnish said commissioner with satisfactory evidence that all persons who have done work or furnished materials under this agreement, and who may have given written notice to the said commissioner, before or within ten days after the completion of the work aforesaid, that any balance for such work or materials is still due and unpaid, have been fully paid or secured such balance.

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"And in case such evidence be not furnished as aforesaid, such amount as may be necessary to meet the claims of the persons aforesaid shall be retained from any moneys due the said party of the second part, under this agreement, until the liabilities aforesaid shall be fully discharged, or such notice withdrawn."

John H. Strahan, for plaintiff.

Lafin Kellogg, for defendants, Bigelow Blue Stone Company and Hazard Powder Company.

LAWRENCE, *J.* — Many of the questions which were elaborately discussed on the summing up of this case I do not deem it necessary for me to consider for the reason that, whether the ordinance referred to by counsel is valid or invalid, it was quite competent for the contractor and the city, as between themselves, to insert in the contract the provision in reference to liens. No creditor of the contractor who claims under the contract can have any greater rights than Gavin himself had under the contract. It was the intention of Gavin, and of the corporation of the city, that those who had done work and furnished materials in and about the performance of the contract should be protected, and I am, therefore, of the opinion that those lienors who filed their claims in accordance with the terms of the contract were entitled to be paid in the order in which the claims were filed, and that the plaintiffs in this action are not entitled to any interest in the funds in the hands of the city until such liens are satisfied.

In this view the claim of Huber & Co. should be directed to be paid first, if it were not for the fact that the assignee of that firm is not a party to the action and has never taken any steps to enforce the lien. I cannot, however, cut him off from his rights until he has had an opportunity of being heard, and the proper disposition of his claim seems to be to reserve the fund until the assignee can be heard. The claims

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of the Hazard Powder Company, of the Bigelow Blue Stone Company and of Michael Sheridan are all for materials furnished or for work done in the performance of the contract and should be paid before the plaintiffs. The plaintiffs concede that the sum of \$769.35, which has already been paid by the city, was properly paid, and, as against them, that amount should be allowed. The claims above referred to, with the interest thereon, more than exhaust the fund. I have looked at the various authorities referred to by counsel and find nothing in them which seems to me to conflict with the conclusions which I have arrived at in respect to this case.

The bank, as the assignee of Gavin, took the contract subject to all the equities existing between him and parties doing work or furnishing materials under the contract, or which, under the terms of the contract, lienors might enforce against him, Gavin (*Greene agt. Warnock*, 64 N. Y., 220; *Schaefer agt. Reilly*, 50 N. Y., 61).

The claims of Babcock and Russell were not for work performed and materials furnished in the execution of the contract, nor do they appear to have been filed with the comptroller or commissioner of public works as provided by the contract. They are not, therefore, within the protection of the contract, and they have no greater rights, as assignees, against the lienors above referred to than Gavin had or the plaintiffs have. As no evidence has been furnished that the persons who have filed liens have been paid there seems to be no objection, as all the parties are before the court except the assignee of Huber & Co., to the court's decreeing that the moneys in the hands of the mayor, &c., of New York be paid, after deducting and reserving the amount due to Huber & Co., to the different lienors, in the order of their priority as above determined. The plaintiffs and the prevailing defendants are entitled to their costs, to be paid out of the fund.

Findings may be settled on five days' notice before me at the January special term.

Van Schaick agt. Sigel.

N. Y. COMMON PLEAS.

HENRY VAN SCHAICK agt. FRANZ SIGEL.

Liability of register of New York for neglect or error in making and returning an official search.

The register of the city of New York is liable for all errors, inaccuracies or mistakes made in a return, where the usual requisition has been made at his office for a certificate of search.

Where the usual requisition was made at the register's office for a certificate of search, which was returned, showing that the premises in question were clear of incumbrance, and relying upon this the loan was effected and the mortgage was recorded, and it was afterwards ascertained that a prior mortgage had been executed on the same premises. Upon foreclosure there was a surplus of \$1,506.11. Plaintiff seeks to recover the amount of his loan from the register, because of the latter's neglect in returning in the search the prior mortgage. The search was made and certificate signed by a deputy. The defendant's liability is based upon the act of July 31, 1873, in relation to the office of register and the defendant claims exemption from liability on the ground that it is one for tort, and that he cannot be held personally liable as the certificate was not signed by him personally:

Held, that, by the act the register was authorized to appoint and pay a deputy who became his agent for the performance of the duties of the office. Such appointees, are in no sense public officers within the meaning of the statute, they being hired or discharged by the register at will, and the clear intent of the statute is not to absolve the register from any liability arising under its provision.

Held, also, that, although the plaintiff in making his requisition at the register's office for a certificate of search designated the clerk whom he desired should make the search, he did not become the agent of the plaintiff. It was only a request and not an employment by the plaintiff, the defendant having control of his office. It was a mere matter of accommodation to the plaintiff that a man of experience should be allowed to make the search.

Held, further, that the plaintiff was not bound to make the search personally, but had the right to rely upon the official certificate of a public officer designated by law to perform the services, and the register is liable for any loss which was the direct and immediate result of negligence or error of the register, that is, the impairment of the value of plaintiff's security by means of his neglect.

Special Term, January, 1880.

Van Schaick agt. Sigel.

IN February, 1874, the defendant was register of deeds, in and for the city and county of New York. About that time one George H. Scott applied to plaintiff through his attorneys, Van Schaick, Gillender & Thompson, for a loan of \$4,000 upon premises situate on One Hundred and Sixth street, in the city of New York. It was agreed between the parties that the loan should be made, and should be a first or prior lien upon the premises above mentioned. In furtherance of this object a requisition was prepared by said attorneys, addressed to said register, requiring him to search and certify, among other things, for all mortgages made by said Scott from October 28, 1868, to February 10, 1870. The search was made, the returns noted thereon, the fees therefor paid by the plaintiff or his attorneys, and a certificate added thereto, dated February 28, 1874, signed "D. Lennox, Ass. Dep. Reg."

Relying upon the correctness of this search and certificate, by which it appeared that the proposed loan would be a first and prior lien upon the premises in question, the plaintiff advanced to Scott the sum of \$4,000, and said Scott executed, as security therefor, a mortgage for that amount, dated February 20, 1874, and recorded in said register's office on the 28th day of February, 1874.

Subsequently it was ascertained that a prior mortgage upon said premises had been executed by Scott to one Edmund Coffin, Jr., for the sum of \$2,500, dated January 13, 1874, and recorded in said register's office January 21, 1874, which said last-mentioned mortgage was not returned upon the search above mentioned, but was omitted from the return upon said search, and of which neither plaintiff nor his attorneys, prior to the making of the loan of \$4,000, had any notice.

In 1875 plaintiff commenced the foreclosure of his mortgage, and on December 24, 1875, obtained a judgment of foreclosure and sale of the premises wherein it was adjudged that there was due to him for principal and interest the sum of \$4,313.44, and \$287.14 for the taxed costs and allowance. Afterwards the Coffin mortgage was foreclosed and judgment

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entered May 1, 1876, wherein it was adjudged that there was due to said Coffin, for principal and interest, the sum of \$1,986.61, and \$260.78 for costs and allowance. Under this last judgment the premises were sold, May 24, 1876, to the plaintiff Van Schaick for \$4,000. From the surplus moneys arising on this sale the plaintiff received the sum of \$1,530.11. In September, 1876, this action was commenced against the defendant to recover \$4,000 damages, by reason of the negligence of the defendant and his employes, in omitting to return, on the search hereinbefore mentioned, the mortgage for \$2,500 held by said Coffin.

Wm. A. Beach, Esq., for plaintiff.

Edward Solomon, Esq., for defendant.

LARREMORE, *J.* — It will be unnecessary to consider what liability, if any, the defendant, as a public officer, has incurred under the common law, or how far the rule of *respondet superior* applies to the present case. The action was tried and discussed upon the sole ground of defendant's liability under an act passed July 21, 1853, by the legislature of this state, entitled "An act in relation to the office of the register of the city and county of New York," (*Laws of 1853, chap. 610*). The first section of said act provides that the register of deeds of the said city and county is authorized to appoint a deputy register and also an assistant deputy, each of whom shall within the office of the said register possess the same powers and be subject to the same duties and responsibilities as the deputy county clerks in the various counties of this state are possessed of, and subject to their respective officers. This section also provides that the compensation of each of said officers shall be fixed and paid by the said register.

The second section of the said act provides, that it shall be the duty of said register to cause any and every written order or written requisition for a search to be made and to be certified, &c., &c. It further provides, that he shall be liable

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for all damages and injury resulting from errors, inaccuracies or mistakes in his return so certified by him.

The third section of said act authorizes and requires the said register to employ all necessary searchers and copyists for the transaction of the business of his office.

The duties and responsibilities of deputy county clerks, referred to in the first section of this act, are defined by Laws of 1831 (*chap.* 237 [1 *Edmunds' Rev. Stat.*, *sec.* 349], *sec.* 58), to wit: When a county clerk shall be absent from the county, or by reason of sickness or any other cause shall be incapable of performing the duties of his office, his deputy may perform all the duties appertaining to the office of clerk of the county, except that of deciding upon the sufficiency of sureties of any officer.

The defendant claims exemption from liability on the ground that this is an action for a tort, and that he cannot be held personally liable therein as the certificate in question was not signed by him personally. I cannot thus construe the act of July 1, 1873. By it he was authorized to appoint and pay a deputy and assistant deputy register, who thereby became his agents for the performance of the duties of his office. Such appointees are, in no sense, public officers within the meaning of the statute. They are not required to give any security for any neglect or omission of duty, and are employed and may be discharged at the will and pleasure of the register. The requisition in question was addressed to the register as such, and the fees for the return thereon were received by him; and the statute says that *he* shall be liable for all errors, inaccuracies or mistakes in the return so certified by him. "When a statute imposes a duty upon a public officer any person having a special interest in the performance thereof may sue for a breach causing him damage; and the same is true of a duty imposed upon any citizen" (*Cooley on Torts*, 654; 44 *N. Y.*, 113; 2 *Abb. Ct. App. Dec.*, 458; 11 *R. S.*, 456; 3 *El. & Bl.*, 402).

Moreover, *he* is authorized and required to employ the

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necessary searchers and copyists to meet the requirements of his office.

It would appear, therefore, that the clear intention of the statute referred to was not to absolve the register from any liability arising under its provisions, although allowing him assistance in the discharge of his onerous and multifarious duties.

Defendant further contended that, as the plaintiff (by his attorneys) had designated Mr. De Grove (one of the defendant's searchers) as the person to make the search in question, De Grove thereby became plaintiff's agent. This proposition cannot be sustained. It was, at most, a mere request to the defendant, and not an employment by plaintiff. Defendant was not obliged to accede to the request, and had entire control and management of the affairs of his office. It may have been a matter of accommodation to plaintiff that a man of experience should perform the service required, but plaintiff incurred no responsibility on this account.

It was further urged that plaintiff did have, or could have had, notice of all incumbrances on these premises, and that if he failed in this respect he was guilty of neglect. This can only mean that he should have made, or caused to be made, a personal search. This he was not bound to do. He had a right to rely upon the official certificate of a public officer designated by law to perform the service required. Defendant further complains that no notice was given him of the existence of the Coffin mortgage, nor of the foreclosure of the plaintiff's mortgage. The statute requires no such condition in fixing his liability. But, if it did, the answer to it would be, that the existence of the one mortgage and the foreclosure of the other were matters of public record, of which plaintiff must be supposed to have had constructive notice. The testimony of Gillender also shows that, before the commencement of this action, he advised the defendant to take the property and give him the money, which proposition defendant did not accept.

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Defendant further contends that the plaintiff should have exhausted his remedy against Scott, who, at the time of plaintiff's recovery of judgment in foreclosure, was solvent. I fail to find, from the testimony, that such was the fact. Scott testified, that in December 1875, he had nothing but equities in real estate; that he had no personal property that was subject to levy or execution; that by the depreciation of real estate he lost every thing he ever had, and was subsequently thrown into bankruptcy. But, as before stated, defendant's liability does not depend upon Scott's insolvency, but the provisions of the statute. There was some comment and criticism upon the fact that an erasure had been made upon the search over the certificate of February 28, 1874. The explanation of this, which was not disputed, was, that the mortgage given by Scott to Coffin had been written over said certificate of February 28, 1874, and appeared as if the same had been returned as a part of the original search. Mr. Gillender, one of plaintiff's attorneys, swears positively that such insertion was not made until September 1876, when he sent the search back to the register's office for continuation. That when he discovered this insertion or interlineation he went to the register's office, called attention to the fact that such interlineation was made long after the date of the first certificate, and demanded that the same should be erased; that it was accordingly erased by the direction of the register or one of his deputies. As to this fact, Mr. Gillender's testimony is corroborated by that of Mr. Fixman, his clerk. Mr. De Grove, who made the search and the continuation thereof, would not testify positively as to the time when such interlineation was made, and, when closely questioned upon this point, said that he would not swear that the interlineation was not made in September, 1876.

From the testimony in this case then, I reach the following conclusion: That the plaintiff, relying upon the official certificate of search and in expectation of having a prior lien upon the premises in question and having no notice of any

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other such incumbrance upon the same, loaned to Scott the \$4,000 secured by the mortgage hereinbefore mentioned. That by the negligence or carelessness of defendant, his deputies, searchers or agents, in not returning the Coffin mortgage over the certificate of search dated February 28, 1874, the plaintiff was misled to his damage and lost something of value, *i. e.*, his priority of lien on the premises in question.

He claims, as compensation for the loss, the full amount of his mortgage, the sum of \$4,000. In this I think he is in error. The defendant is liable only for any loss which was the direct and immediate result of the negligence or error (*Knight agt. Wilcox*, 14 *N. Y.*, 413; *Sprague agt. Eccleston*, 1 *Lans.*, 74).

This is not the face of plaintiff's mortgage but the impairment in value of plaintiff's security *in rem.* for said mortgage. If the defendant had paid off the Coffin mortgage and caused the same to be canceled, the plaintiff would have been in the position originally contemplated when he made the loan. The defendant is responsible for any loss directly occasioned by the existence of the Coffin mortgage as a lien upon said premises. This, it would appear, is the amount due upon the Coffin mortgage and all costs and expenses incurred in its collection. Plaintiff may have sustained other losses in the transaction which may be attributed either to the irresponsibility of the mortgagor whose bond he held, or to the general depreciation in value of the property mortgaged. But losses of this character are not direct consequences of the register's negligence, nor is he to be held liable therefor.

It appears from the judgment roll for the foreclosure of the Coffin mortgage that the amount due Coffin April 27, 1876, was as follows:

For principal and interest	\$1, 986 61
For costs and allowances.....	260 78
	<hr/>
Making, in all, the sum of.....	<u><u>\$2, 247 30</u></u>

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This is the amount of defendant's liability in this action.

Let findings and a decree be prepared in accordance with the views above expressed.

SUPREME COURT.

THE PEOPLE *ex rel.* JULIUS BRACK agt. BERNARD REILLY,
sheriff of the county of New York.

Execution—against the person—what it must recite—Code of Civil Procedure, section 1873.

An execution against the person, which recites that an execution has been issued to the *proper* county, and returned unsatisfied is insufficient. It must specify the county *eo nomine*, and if it does not, the defendant may be discharged on *habeas corpus*.

New York Special Term, November, 1879.

THE petitioner having been imprisoned under an execution against his person, applies for his discharge under a writ of *habeas corpus*, on the ground that the process under which he was arrested does not specify the county to which an execution against his property was issued. The respondent objects, on the ground that the petition, under which the writ of *habeas corpus* was granted, does not show that the petitioner is in the custody of the sheriff of the county of New York, and that the statute prohibits the court from discharging the petitioner, upon the ground that his person is charged upon a process issued on a final judgment of a competent court, and further, that the process substantially complies with the requirements of the Code.

Bernard Metzger, for petitioner.

A. C. Smith, for respondent.

Vanderpoel, Green & Cuming, for sheriff.

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DANIELS, J. — From the statement made, that the relator is imprisoned in the county jail under an execution against his person, it is to be inferred that he is detained in the custody of the sheriff of the county. That fact is substantially made to appear, and that complies with what has been required by the statute on this subject (3 R. S. [5th ed.], 884, sec. 39). The relator is not precluded from prosecuting the proceeding because of his imprisonment under execution, where that process may appear to be void for want of authority to issue it. Both the provisions made by the statute concerning process of this description, require the construction to be given to the one particularly relied upon by the respondent in the proceeding (*Ib.*, 883, sec. 36, sub. 2; 887, sec. 56, sub. 3). If that be the nature of the instrument under which the relator is detained, and it so appears upon its face, then it is not legally an execution in any such sense as will preclude a determination of its validity by virtue of the writ of *habeas corpus*. The objection to the process, made in support of this application for the relator's discharge, is, that it failed to comply with what has been prescribed by section 1372 of the Code, and that this failure is disclosed by the process itself. It states that an execution against property was issued to the proper county without indicating what that county was, while by this section of the Code, the execution against the person, in order to subject the defendant to arrest by means of it, must specify the county to which the execution against property was issued; this is one of the safeguards provided by the legislature to prevent an arrest upon execution before the remedy against the property of the judgment debtor has been exhausted. It is in the nature of a condition which must be legally observed before an imprisonment of the person can be admitted. The defect was a substantial one, rendering the case an improper one for arrest on execution. As the process was issued the arrest was unlawful and the relator must be discharged; provided, however, that he first files a stipulation that he will not bring an action for false imprisonment.

McCrea agt. McCrea.

SUPREME COURT.

FRANK O. MCCREA agt. THOMAS A. MCCREA.

*Answer — Action for divorce — Motion to strike out a pleading, when denied —
Reference — Code of Civil Procedure, sections 538, 545, 546, 968.*

In an action brought by the wife against the husband for adultery where the defendant appeared and denied the adultery, and on the plaintiff's motion the defendant was ordered to pay a certain sum towards the expenses of the action, and upon demand being made the defendant neglected and refused *in toto* to comply with the order, upon proof of these facts the plaintiff moves for an order "striking out the defendant's answer and for an order of reference as in case of default:"

Held, that the motion should be denied. The only power possessed by the court to strike out a pleading, or to change and alter the same in any particular on a motion like this, is contained in sections 538, 545 and 546 of the Code of Civil Procedure; and this is not a case within either of those sections.

So long as there is an issue framed by the pleadings, in an action for a divorce, there can be no reference.

Cayuga Special Term, October, 1879.

THE parties are husband and wife. The plaintiff alleges adultery on part of the defendant, and asks for a decree of divorce.

The defendant appears and denies the adultery.

On the plaintiff's motion, the defendant was ordered to pay seventy-five dollars to the plaintiff "towards the expenses of this action," and to be paid in twenty days.

A proper demand of payment was made on the defendant to perform order, and he neglected and refused *in toto*.

On proof of these facts by affidavit, the plaintiff moves for an order "striking out the defendant's answer herein, and for an order of reference herein, as in case of default."

Mr. Hughitt, for motion.

Mr. Durston, opposed.

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BARKER, J.—The motion is denied, without costs. It is held that the only power possessed by the court to strike out a pleading, or to change and alter the same in any particular, on a motion like this, is contained in sections 538, 545 and 546 of the Code. It is not pretended by the counsel for the plaintiff that he has made a case within either section.

In a proceeding to adjudge the defendant guilty of a contempt, it may be the court can, as a means of punishment, strike out his answer. On that point, I do not now express my opinion.

So long as there is an issue framed by the pleadings, in an action for divorce, there can be no reference (2 *R. S.*, p. 145, sec. 40, *marginal*; *Code*, 968; *Batzel agt. Batzel*, 54 *How. Pr.*, 139).

NEW YORK COMMON PLEAS.

JOHN FISCHER agt. JOHN RAAB *et al.*

Referees — not bound to give up report till fees paid — Referee's fees not costs — when may be collected by process for contempt.

A referee is not obliged to give up his report until his fees have been paid. It is the practice now, as it has always been the practice of the court of chancery, for the court to compel obedience to its orders, by process of contempt.

The act of 1847 has abolished the collection of interlocutory costs, by process of contempt.

Referee's fees are not costs.

An order for the payment of moneys not collectible by execution, may, under the existing law, be enforced by process of contempt.

Rules of practice rest upon considerations of fairness no less than upon convenience. A person called upon to pay money should have presented to him evidence that the person who demands it has authority to receive it; and, for this reason, a demand for interlocutory costs should be made only by the party entitled to them, or by some person authorized by him to collect the money, and it is not necessary for the party upon whom the demand is made to require the exhibition of the authority.

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A demand for the payment of referee's fees must be made personally, and the authority of the person making the demand must be shown.

Where bad faith is manifested by an appellant and his attorney throughout a proceeding, costs of appeal will not be allowed, and where a stipulation is required by the court as part of the terms of the reversal of an order or judgment, and the party elects or refuses to stipulate the order or judgment appealed from will be affirmed, *with costs*.

General Term, November, 1879.

APPEAL from an order made by judge JOSEPH F. DALY, dated December 4, 1878, adjudging the plaintiff guilty of contempt, and committing him to Ludlow street jail for his refusing to pay certain fees of a referee which he had stipulated to pay in a certain contingency, and which contingency had happened.

On the 2d day of September, 1878, the plaintiff, on motion of Henry Wehle, his attorney, obtained a preliminary injunction with an order to show cause why the same should not be made perpetual, restraining certain defendants (principally the officers and trustees) of the "Kranken Unterstützungs Verein Deutsche Freund Einigkeit," a voluntary unincorporated association, from drawing and receiving, and the defendant Fish, as a receiver of the Teutonia Savings Bank from paying out the moneys, or any part of the moneys deposited by said unincorporated association in said bank and why a receiver of all the property of the said association should not be appointed.

Upon the hearing of this motion, forty-two of the defendants (respondents) in opposition thereto, produced an affidavit signed and sworn to by them to the effect that the *plaintiff, himself*, made a motion at a meeting of the society, and then at a *subsequent* meeting, the *plaintiff, himself*, also made a motion to "overthrow" and "cancel" his former motion, "and that the society continue as before." As the effect of this affidavit would *estop* the plaintiff in his action, the plaintiff's attorney, Henry Wehle, very adroitly, in open court, impeached this affidavit contending that as the forty-two affiants were Germans, they did not understand what they

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had sworn to, and that the fact was that the plaintiff did not make the *second*, or *subsequent* motion, but that the same was made by some other member of the society; a reference on this disputed question of fact was ordered by judge JOSEPH F. DALY to judge John A. Dinkel, "to determine and report upon such fact with all convenient speed; *the plaintiff to pay the expenses of said reference unless the said forty-two defendants or a majority of them shall testify upon said reference that they did not make, for the purpose of their said affidavit, the statement that plaintiff made the motion aforesaid, in which case the defendants, represented by Mr. Langbein, shall pay such expenses.*"

The referee, after patiently hearing testimony for three months, both in the daytime and in the evening, made his report in favor of the forty-two defendants, and on the refusal of the plaintiff to pay the referee's fees, the order of December 4, 1878, was made by judge JOSEPH F. DALY, committing the plaintiff to Ludlow street jail.

This branch of the case is fully reported in the 56th of *Howard's Reports*, page 218.

The plaintiff thereupon obtained a writ of *habeas corpus* from the supreme court on the ground that judge DALY had no jurisdiction to issue the commitment. Judge BRADY dismissed the writ with costs and remanded the prisoner.

The proceedings on the *habeas corpus* are fully reported in the case of *The People of the State of New York ex rel. John Fischer agt. John Reilly as sheriff of the City of New York* (in the 56th *Howard's Reports*, page 223).

The referee having filed his report and testimony, the forty-two defendants served a notice on the plaintiff and on the twenty-one defendants seeking affirmative relief, to proceed with the motion to make the injunction perpetual and that at the same time a motion would be made to dissolve the temporary injunction. The plaintiff having failed to file exceptions to the referee's report within eight days as required by rule 30 (old rule 39), then moved to set the same aside

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and that he have a new hearing. The three motions were argued together, and judge JOSEPH F. DALY confirmed the referee's report and dissolved the injunction. This branch of the case is fully reported in the 57th *Howard's Reports*, page, 87.

From the order of December 4, 1878, the plaintiff appealed.

Henry Wehle, for appellant, made and argued the following points :

I. The question as to whether a majority of the forty-two defendants had made the statement for the purpose of their affidavit, that the plaintiff had made the motion to overthrow the minutes of April twenty-eighth, was not referred to the referee for his determination and his adjudication upon that point is *ultra vires*.

II. The order directing the payment of the sum of \$130 to the referee, could not be made without notice to the plaintiff's attorney.

III. The order of November twenty-seventh was a proceeding in the action and should have been served upon the plaintiff's attorney (*Code of Civil Procedure*, sec. 799; *Pitt agt. Davison*, 37 *N. Y.*, 235; *Leland agt. Smith*, 3 *Daly*, 320). But even if it was sufficient to serve the order to show cause upon the plaintiff in person, the plaintiff's attorney was certainly entitled to service of the order directing the payment of the sum of \$130, which is a distinct feature of the order of the twenty-seventh day of November.

IV. The referee's fees in this case are in the nature of interlocutory costs, and cannot be enforced by arrest (*Code*, sec. 15; *Laws of 1847*, chap. 390). They are disbursements taxed as part of the costs (*Lansing agt. Lansing*, 4 *Lans.*, 395; *Ford agt. Ford*, 10 *Abb. Pr. R. [N. S.]*, 74).

V. In order to punish a party for non-payment of a sum of money ordered to be paid a demand must be shown (*Gray agt. Smith*, 24 *How.*, 432; 3 *R. S. [5th ed.]*, 850, sec. 4). No demand under the order of November twenty-seventh is

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shown. The demand previous to that order being made by an unauthorized person would, for that reason alone, be of no avail.

VI. There is no foundation for the charge of contempt of court against the plaintiff, even if payment of the fees were incumbent upon the plaintiff. If non-payment of the referee's fees were ground for a proceeding for contempt under section 14 of the Code, still the order cannot be sustained as there is not even a suggestion that the rights or remedy of the party to the action were or could be "affected, defeated, injured, delayed or prejudiced," which is a prerequisite to a proceeding under section 14.

George F. & J. C. Julius Langbein, for the forty-two defendants, respondents, made and argued the following points:

I. The power of the court to commit the plaintiff for contempt in disobeying the order of the court on his own stipulation, cannot be denied successfully. The order to pay not having been complied with, the party may be punished as for contempt (*Code, sec. 14, sub. 3*; see *judge J. F. DALY's opinion in 56 Howard, p. 218*; see *judge BRADY's opinion in 56 Howard, p. 223*). Judge BRADY distinctly says: "The power to commit under the circumstances I do not doubt. The expensive process was adopted as a favor to the relator (plaintiff) on his promise to pay, and he was bound to keep it.

II. Plaintiff not denying the affidavits and papers upon which the order to show cause of November 27, 1878, was granted they must be taken as true, and as admitted to be true. Judge J. F. DALY, in his opinion and the appeal papers, show that on the return day of the order to show cause the plaintiff appeared by his counsel, Henry Wehle, and took certain purely technical objections. He did not deny any thing, read no affidavits in opposition, but relied solely and wholly upon his objections. He, therefore, did not dispute his liability and merely discussed the sufficiency of the

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proof of such liability and the mode in which notice of the fact is brought to the court (*See judge J. F. DALY's opinion, supra*).

III. The violation of the order of September 17, 1878, after the service of the certificate upon him, was a plain, clear, open violation, and, therefore, a contempt of court for which he could be punished. Both judge BRADY and judge J. F. DALY agree upon this point. Judge BRADY says: "The event occurred and then the court directed the payment of the fees in accordance with the compact made. He refused or declined to pay, and for this contempt was committed." Judge DALY says: "Justice requires that he should be held to his stipulation. He agreed to pay the expenses of the reference in a certain event. His agreement was embodied in the order of reference; the event upon which his liability depends occurs. He is ordered to pay and he refuses, giving no reason" (*See opinion of judges BRADY and J. F. DALY, supra*).

IV. Demand of the referee's fees was legally and properly made. Judge DALY says: "Demand of the fees was not necessary in addition to the service of the order demanding him to pay." The order of the court of November 27, 1878, ordering the plaintiff to pay the referee's fees, was served upon him. It ordered him to pay them within three days. Judge DALY says "he is ordered to pay, and he refuses giving no reason." The affidavit of George Rudolph shows the demand, and that the fees were not paid.

V. It was not necessary that the plaintiff's attorney should also be served with the order to show cause why the plaintiff should not be punished for contempt. Service upon the plaintiff personally was sufficient (*Albany City Bank agt. Schermerhorn*, 9 Paige, 372; *Pitt agt. Davidson*, 37 N. Y., 35). The last case cited shows the distinction between a criminal and a civil contempt, and holds that where the party himself cannot be found, then it may be served upon his attorney; the object being to give notice to the party pro-

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ceeded against. There was no direction in the order to show cause to serve the attorney for the plaintiff, and the case last cited states distinctly that the statute in civil contempts fails to state what the manner of service is, and leaves it to the discretion of the court in effect. Service on the party to be adjudged in contempt, was, therefore, clearly enough and sufficient.

VAN HOESSEN, J.—The plaintiff stipulated to pay the referee's fees in case he failed to prove before that officer that certain persons had made an affidavit in ignorance of its contents. He also obtained an order staying proceedings upon the application for an injunction until the report of the referee had been brought into court. The obtaining of the report from the referee was, therefore, essential to the further hearing of the motion for the injunction. It is true that the court might, if so disposed, have vacated the injunction order without waiting for the referee's report, but such was not its pleasure. The referee was not obliged to give up his report until his fees had been paid, and unless the court could compel the plaintiff to take up the report, it would have been in the plaintiff's power to postpone indefinitely the determination of the motion for the injunction. Especially would this be so if the court deemed the production of the report essential to a proper understanding of the case.

The only obstacle to the obtaining of the report was the refusal of the plaintiff to pay the fees which he had stipulated to pay. Under these circumstances it was, I think, eminently proper for the court to make such an order as would result in the bringing of the report into court. It is true that the order made required the payment of money, but that did not prevent the enforcement of it in the manner provided for the enforcement of other lawful orders. The regular method of compelling obedience to orders is by process of contempt. Such has always been the practice of the court of chancery. Formerly interlocutory costs were col-

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lected by process of contempt, but that is no longer the practice; the act of 1847 having abolished it. An order for the payment of money not collectible by execution may, under the existing law, be enforced by process of contempt. The fact that the payment of money is involved, and that before the final determination of the suit, does not, as the counsel for the plaintiff seems to suppose, make the order one for the payment of interlocutory costs. The referee's fees were not costs (*Concklin* agt. *Taylor*, 68 *N. Y.*, 221). They were not payable to a party to the cause. Costs are always payable by one party to another.

The order was not, in any sense, one for the payment of interlocutory costs. They could not be allowed as costs of motion (*id.*); nor could any execution be issued to collect the referee's fees; there was no reason, therefore, why obedience to it should not have been enforced by process of contempt. We think, however, that the method of collecting these referee fees should have been the same as that formerly pursued for the collection of interlocutory costs. Rules of practice rest upon considerations of fairness no less than upon convenience. It seems to us fair that a person called upon to pay money should have presented to him evidence that the person who demands it has authority to receive it. The demand for interlocutory costs should, for this reason, be made only by the party entitled to them, or by some person authorized by him to collect the money (*Wilkins* agt. *Stevens*, 19 *Vesey*, 117; 2 *Archibold's Practice*, p. 340; *Jackson* agt. *Sackett*, 6 *Cowen*, 39). A personal demand upon the plaintiff should have been made (*People* agt. *Bennett*, 4 *Paige*, 282), and the authority of the person making the demand should have been exhibited. In a word, the same reasons which required these formal proceedings for the collection of costs apply to the collection of the referee's fees in this case. The clerk of Mr. Langbein, who made the demand, does not appear to have had any authority from the referee, and he did not exhibit to the plaintiff any evidence of his right to receive

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the money. It was not necessary for the plaintiff to require the exhibition of the authority (*Jackson agt. Sackett, 6 Cowen, 38*). Upon the ground that the right of Mr. Langbein's clerk to demand of Fischer the fees was not exhibited, and has not been shown, we think the order appealed from should be reversed; but, in view of the bad faith exhibited on his side, we shall not award costs to the plaintiff, and we make it part of the terms of reversal, that the plaintiff shall stipulate not to bring any action on account of his imprisonment.

This stipulation must be handed up with the proposed order of reversal.

CHARLES P. DALY, chief justice, concurred.

MEMORANDUM. — The general term itself wrote and handed down the following order :

At a general term of the court of common pleas, held
at the county court-house, in the city of New
York, on the 19th day of January, 1880.

Present — DALY, *chief justice*, and
VAN HOESEN, *justice*.

JOHN FISCHER, APPELLANT, agt. JOHN RAAB AND OTHERS, RESPONDENTS.	}
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The plaintiff's appeal from the order of judge J. F. DALY, entered December 4, 1878, having been reached in its order on the calendar, and argued by Mr. Wehle for the appellant, and by Mr. Langbein for the respondents, it is ordered that, if the appellant shall forthwith file a stipulation not to bring any action on account of his imprisonment, the order appealed from be reversed, without costs; but that said order be affirmed if the appellant shall refuse to give such stipulation. The order of reversal is upon the ground that the person who made the demand upon the appellant did not, when making such demand, exhibit his authority to collect the money, and

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that ground being of a purely technical nature, the giving of a stipulation not to sue is exacted as a condition of the reversal. The reversal is without costs because of the extremely bad faith manifested by the appellant and his attorney throughout the proceedings.

The appellant having refused to give the stipulation, and it being so recorded, the general term thereupon made the following order :

At a general term of the court of common pleas, held
at the county court-house, in the city of New
York, on the 19th day of January, 1880.

Present — HON. CHARLES P. DALY, *chief justice*, and
GEORGE M. VAN HOESEN, *justice*.

JOHN FISCHER, APPELLANT, agt.	}
JOHN RAAB AND OTHERS, RESPONDENTS.	

An order having been entered on the 19th day of January, 1880, ordering that if the appellant shall forthwith file a stipulation not to bring any action on account of his imprisonment, the order of judge J. F. DALY, entered December 4, 1878, appealed from, be reversed, without costs, but that the order be affirmed if the appellant shall refuse to give such stipulation, and said order of January 19, 1880, reciting that "the order of reversal is upon the ground that the person who made the demand upon the appellant, did not, when making such demand, exhibit his authority to collect the money, and that ground being of a purely technical nature, the giving of a stipulation not to sue is exacted as a condition of the reversal. The reversal is without costs, because of the extremely bad faith manifested by the appellant and his attorney throughout the proceedings," and it appearing by a written memorandum made by chief justice DALY, now on file with the clerk of this court, as follows : "Plaintiff elects not to stipulate ; C. P. D," on motion of J. C. Julius Langbein, Esq., attorney

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for the defendants, respondents, it is ordered that the order of judge J. F. DALY, entered December 4, 1878, be and the same is hereby affirmed, with costs.

COURT OF APPEALS.

STEPHEN D. MARSHALL and GEORGE M. MILLER, executors
plaintiffs, appellants, agt. THOMAS A. DAVIES and others,
defendants, respondents.

Mortgage foreclosure — Rights of mortgagor and mortgagee — when relation of principal and surety arises — Practice — Rules of evidence — Power of general term to order a new trial.

Where the mortgagor conveys to a third party, who assumes the mortgage, the relation of principal and surety arises between the mortgagor and his vendee, and after notice of this relation the mortgagee is bound to observe it and abstain from doing any act to the prejudice of the mortgagor, or which would impair his recourse against the mortgaged premises in case he should be obliged to pay his bond and be subrogated to the mortgagee; the mortgagee in such a case, after notice, cannot, with impunity, release the land or extend the time of payment, or do any other act to the prejudice of the mortgagor, and the prohibited acts are determined by the law of principal and surety.

But the actual relation of debtor and creditor between the mortgagor and mortgagee cannot be destroyed by any act of the mortgagor alone, where the mortgage is given to secure the bond of the mortgagor.

In cases like the present the relation of creditor and principal debtor is so affected that the mortgagee is bound, after notice of the equitable rights of the mortgagor, as between himself and vendee, to respect them and do no act to their prejudice, and when he forecloses the equities of the mortgagor will be protected in the order of sale. But the mortgagee may sue upon the bond in the first instance, notwithstanding the transfer of the land.

Where a vendee of mortgaged premises has assumed the payment of the mortgage, the mortgagor cannot compel his creditor to foreclose when there is no good reason why he did not pay his bond according to his agreement and take an assignment of the bond and mortgage and proceed against the land and the subsequent grantees thereof for his indemnity. He can also proceed in equity to compel such grantees, as

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to whom he stood in the situation of a mere surety, to discharge the debt for his protection.

In the absence of any notice of change in the position of the mortgagor, and of any request to foreclose, a mortgagee out of possession may rely upon the personal liability of his debtor, and is not bound to look after or protect the mortgaged premises; and if he foreclose the mortgage, the debtor is entitled to credit only for the net proceeds of sale realized by his creditor, after the deduction of all liens for taxes, &c., and remains liable for the deficiency.

It is a familiar rule for the conduct of a trial, that a party holding the affirmative is bound to introduce all the evidence upon his side before he closes. He must exhaust all his testimony in support of the issue on his side before the testimony on the opposite side has been heard.

He can afterwards introduce evidence in rebuttal only. Rebutting evidence, in such cases, means not merely evidence which contradicts the witnesses on the opposite side, and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove.

Where the defendant had been examined in support of his allegation of notice and request to foreclose a mortgage, and he had testified to a conversation with M., upon which he relied, and that he thought there was none subsequent:

Held, that having rested his case, and the plaintiff having closed his testimony, the defendant had no legal right to reopen his own case and introduce evidence to sustain his defense, which he might have introduced when the case was with him.

Held, further, that after having testified to one conversation which was denied on the other side, the defendant was not entitled, as a matter of right, to prove another as to which he had not previously testified, even though it tended to support his original statement.

This was not evidence in rebuttal. The testimony on the part of the plaintiff was that other conversations might have been held, but that no conversation of the nature testified to by the defendant ever took place. This was a mere denial, and not proof of any affirmative fact which the defendant had the right to rebut.

These rules may, in special cases, be departed from, in the discretion of the trial judge, but a refusal to depart from them is no ground of exception.

Where an order of the general term does not state that the reversal was on any question of fact, it cannot be sustained unless it be made to appear that some error of law was committed by the trial judge.

Where a case comes before the general term, on appeal from the judgment and exceptions only, it has no discretionary power to order a new trial in the absence of legal error.

November, 1879.

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THIS was an action to foreclose a mortgage. February 1, 1871, the defendant Davies, executed to plaintiff a bond and mortgage for \$16,000, payable February 1, 1874. October 3, 1871, defendant Davies conveyed the mortgaged premises to the defendant Leslie, and Leslie thereby assumed the payment of the bond and mortgage. October 30, 1872, defendant Leslie conveyed the mortgaged premises to defendant Cornen, who also assumed the payment of the mortgage. The principal was not paid at maturity, but interest was paid up to June, 1876, and none thereafter.

The defendant Davies answered :

1. That after the sale to Leslie, he (Davies) had requested plaintiffs to foreclose and collect from Leslie, and that after due date plaintiffs neglected so to do and that premises became of less value, and Leslie became insolvent, and since the maturity of the mortgage, taxes and assessments have accumulated on the property.

2. That plaintiffs had extended the time of payment of the bond and mortgage after the sale by Davies to Leslie.

The case was tried before Mr. justice BARRETT. On the trial no evidence was given of any extension of time. Evidence of a notice to foreclose, etc., was given by defendant Davies, and contradicted by plaintiffs, and the court found no such notice was given. It was found that since the maturity of the mortgage, the taxes for 1875, 1876 and 1877, amounting to \$803.60, had been levied on the property, and were unpaid, and that assessments confirmed in 1874 and 1876, amounting to \$1,273.52, were also unpaid, and the judgment of foreclosure and sale directed these taxes and assessments to be paid out of the proceeds of sale. Defendant Davies afterwards moved to strike out of the judgment the words directing the referee to pay such taxes, etc., out of the proceeds of sale, and the motion was denied, and judgment for deficiency for \$5,795.75, including such taxes and assessments, was entered against defendant Davies, who appealed

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to the general term from the judgment of deficiency and the order denying such motion.

The general term reversed the judgment for deficiency, and granted a new trial, holding that the taxes and assessments should not have been deducted from the proceeds of sale, and that the deficiency judgment against defendant Davies, was too large by the amount of such taxes and assessments. The plaintiffs appealed from the order of the general term to the court of appeals, with stipulation, and the court of appeals have reversed the order of the general term and affirmed the judgment rendered at special term, with costs, giving the following opinion :

Wheeler H. Peckham, for appellant.

Samuel Hand and *Edmund Coffin, Jr.*, for respondents.

RAPALLO, J. — As the order of the general term does not state that the reversal was on any question of fact, it cannot be sustained unless it be made to appear that some error of law was committed by the trial judge. The case came before the general term on appeal from the judgment and exceptions only, and it had no discretionary power to order a new trial in the absence of legal error. The only exception to rulings at the trial which has been argued is that taken by the defendant to the exclusion of the question to him on his being recalled, after the plaintiff had rested, whether he had had conversations with Mr. Miller in 1870 or 1871 at his office.

The question of fact at issue was whether the defendant had notified Mr. Miller of the sale of the mortgaged premises to Leslie, and had requested Miller to proceed to collect the amount which might become due upon the mortgage at maturity. The defendant Davies, who had the affirmative of the issue, testified in his own behalf that he sold the property to Leslie in October, 1871; that about the time the first

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or second installment of interest on the mortgage became due after the sale he went to Miller's office and there told him that he had sold the property to Leslie, who had assumed the payment of the mortgage, and asked to collect the interest of Leslie, and, also, the principal when it became due, and if he did not pay it to foreclose the mortgage at once, and that Miller assented to that proposition, and that from the time of that interview until the 6th of January, 1877, he thought he had no further interview with Miller or the plaintiffs.

Miller being called on the part of the plaintiff testified positively that no conversation of that kind ever took place. On cross-examination he was asked whether he had any conversation at all with the defendant Davies in 1870 or 1871, and he answered, none that he remembered; that he might have had conversations that he did not remember, but none of the nature testified to by the defendant.

After the plaintiff had rested, the defendant Davies was recalled and asked whether he had any conversation with Mr. Miller during the years 1870 or 1871 at his office. This question being objected to on the ground that the witness had already given his testimony was excluded, and exception taken.

The witness was then permitted to assert the positiveness of his recollection of the conversation to which he had already testified, and to state the circumstances which enabled him to be positive.

We cannot discover any legal error in the ruling excepted to. The court went further than strict rules required it to go in permitting the defendant to be re-examined as to his original statement. This, however, was purely discretionary. If the question which was excluded was intended to refer to this conversation the exception is groundless.

If the question related to any other conversation the exception is equally without foundation. Unless the conversation sought to be proved was material and tended to maintain the issue on the part of the defendant, it was irrelevant. If it

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was material, then it was entirely within the discretion of the court whether or not to permit the inquiry. The defendant had been examined in support of his allegation of notice and request to foreclose. He had testified to a conversation with Mr. Miller upon which he relied, and that he thought there was none subsequent. Having rested his case, and the plaintiff having closed his testimony, the defendant had no legal right to reopen his own case and introduce evidence to sustain his defense, which he might have introduced when the case was with him. No rule for the conduct of a trial is more familiar than that the party holding the affirmative is bound to introduce all the evidence on his side before he closes (*Hastings agt. Palmer*, 20 *Wend.*, 225). He must exhaust all his testimony in support of the issue on his side before the testimony on the opposite side has been heard (*Ford agt. Niles*, 1 *Hill*, 301; *Rex agt. Stimson*, 2 *Carr. & P.*, 415). He can afterward introduce evidence in rebuttal only. Rebutting evidence in such cases means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove (*Silverman agt. Foreman*, 2 *E. D. Smith*, 322; 2 *Carr. & P.*, 416). In the present case, after having testified to one conversation which was denied on the other side, the defendant was not entitled, as matter of right, to prove another as to which he had not previously testified, even though it tended to support his original statement. This was not evidence in rebuttal. The testimony on the part of the plaintiff was that other conversations might have been held, but that no conversation of the nature testified to by the defendant ever took place. This was a mere denial and not proof of any affirmative fact which the defendant had the right to rebut. These rules may, in special cases, be departed from in the discretion of the trial judge, but a refusal to depart from them is no ground of exception.

The findings of fact of the trial judge disclose no error in

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his conclusions of law. He finds no notice to the mortgagees of the conveyance from Davies to Leslie, and no request to the plaintiffs to foreclose, and there is no uncontroverted evidence in the case which required him to find those facts. Whether, if they had been found, the defendant would have been entitled to judgment, we do not now decide. But clearly in the absence of those facts the defense cannot be sustained. As between the plaintiffs and the defendant Davies, he was the principal debtor, and the plaintiffs were not bound to look after the taxes on the mortgaged premises. We have held, that where the mortgagor conveys to a third party, who assumes the mortgage, the relation of principal and surety arises between the mortgagee and his vendee, and that after notice of this relation the mortgagee is bound to observe it, and abstain from doing any act to the prejudice of the mortgagor, or which would impair his recourse against the mortgaged premises in case he should be obliged to pay his bond and be subrogated to the mortgagee. The mortgagee in such a case, after notice, cannot, with impunity, release the land, or extend the time of payment, or do any other act to the prejudice of the mortgagor, and the prohibited acts are determined by the law of principal and surety. (*Calvo agt. Davies*, 73 N. Y., 211.) But the actual relation of debtor and creditor, between the mortgagor and mortgagee, cannot be destroyed by any act of the mortgagor alone, where the mortgage is given to secure the bond of the mortgagor. The courts have gone no further than to hold that in cases like the present, the relation of creditor and principal debtor is so far affected that the mortgagee is bound, after notice of the equitable rights of the mortgagor as between himself and vendee, to respect them, and do no act to their prejudice; and, when he forecloses, the equities of the mortgagor will be protected in the order of sale. But the mortgagee may sue upon the bond in the first instance, notwithstanding the transfer of the land. This has often been decided. In *Marsh agt. Pike* (10 Paige, 595) it was held that where a

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vendee of the mortgaged premises had assumed the payment of the mortgage, the mortgagor could not compel his creditor to foreclose, when there was no good reason why he did not pay his bond according to his agreement, and take an assignment of the bond and mortgage, and proceed against the land and the subsequent grantees thereof for his indemnity, and that he could also proceed in equity to compel such grantees, as to whom he stood in the situation of a mere surety, to discharge the debt for his protection. The defendant Davies, having no right to compel the plaintiffs to foreclose the mortgage, it is questionable whether a request to do so could have been of any avail. His request to collect the debt might have been answered by bringing an action against him on his bond, and the necessity of this he could have obviated by voluntarily paying it, and being subrogated to the rights of the mortgagee. It is, to say the least, doubtful whether a mortgagor thus situated has any remedy, except to protect himself by watching the security, and if he finds that it is becoming impaired by lapse of time and the accumulation of interest and taxes, to take the steps pointed out in *Marsh agt. Pike (supra)*.

It is very clear, however, that in the absence of any notice of change in the position of the mortgagor, and of any request to foreclose, a mortgagee out of possession may rely upon the personal liability of his debtor, and is not bound to look after or protect the mortgaged premises; and that if he forecloses the mortgage, the debtor is entitled to credit only for the net proceeds of sale realized by his creditor, after the deduction of all liens for taxes, &c., and remains liable for the deficiency. In the numerous foreclosures which have taken place in the state since the organization of the court of chancery, no claim to the contrary appears to have been made, and we can perceive no foundation upon which such a claim can rest.

The order of the general term should be reversed, and the judgment at special term affirmed, with costs.

Brummer agt. Cohn.

N. Y. COMMON PLEAS.

PEANE BRUMMER, respondent, agt. JACOB COHN, appellant.

Insurance (life) — Endowment policy upon life of husband for benefit of wife not assignable by her — Laws of 1840, chapter 277.

An endowment policy on the husband's life, payable on a day certain, or previous to that time, if the husband should die before said date, to his wife, her executors, administrators or assigns, although the premiums be paid by the husband, should be regarded as a life policy, to all intents and purposes, during its continuance, and, therefore, *non-assignable* (*Affirming S. C., 57 How., 386*).

It is not necessary that the policy should refer, in terms, to the act of 1840 (*chap. 277*), or to the acts amendatory thereof, nor that the policy should contain provisions for the benefit of the children in case the wife should not survive her husband.

*General Term, January, 1880.**Julien T. Davies, for appellant.**A. Blumenstiel, for respondent.*

LARREMORE, J. — On May 12, 1868, in consideration of representations made in the application hereinafter referred to, and in consideration of the sum of \$287.30 duly paid to the Mutual Life Insurance Company of New York by Peane Brummer, the respondent, wife of Aaron Brummer, and in consideration of the annual payment of a like amount on or before May twelfth in each and every year during the continuance of the policy hereinafter mentioned, the said company did insure the life of the said Aaron Brummer in the amount of \$10,000. Said company promised to pay said amount to the said Peane Brummer, her executors, administrators or assigns, on May 13, 1883, or within sixty days after due notice and proof of the death of said Aaron Brummer, should he die

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previous to said date. This agreement and certain covenants and conditions were embraced in a policy, No. 81,430, issued by said company to said Peane Brummer, and upon which the premiums therein mentioned have been duly paid by her husband. On July 11, 1874, Mrs. Brummer assigned this policy to the appellant Cohn, and guaranteed the validity of the assignment. The respondent brought suit to compel a reassignment of the policy, alleging in her complaint that said assignment was made as security for a loan to her husband, which loan had been repaid to appellant. The appellant denied such repayment; issue was joined between the parties which was tried and decided in favor of the respondent on the ground that such assignment was void at law under the statute of 1840 (*chap. 80*).

A judgment was entered on such decision directing a reassignment of the policy in question, and that the same and the assignment thereof be filed with the clerk of this court. Cohn complied with the terms of the judgment, and now brings this appeal.

Although the issues of a loan by the appellant to the husband of respondent, and payment thereof were distinctly raised by the pleadings, the decision was put upon the sole ground of the non-assignability of the policy in question. It was admitted on the trial that, at the time of the application for insurance, and, also, at the time of this assignment, the respondent was a married woman, having children, then living and still living. The only question for review, in the case as presented, is whether the policy in question is within the meaning and intent of the statute, entitled "An act in respect to insurances for lives, for the benefit of married women," passed April 1, 1840 (*Laws 1840, chap. 80*), and the acts amendatory thereof.

It will be seen that this is not an ordinary policy upon the life of the husband in favor of the wife, and payable on his death to her or her legal representatives. It is an endowment policy, payable on a day certain, May 12, 1883, or previous to

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that time if the husband should die before said date. The counsel for the appellant argued that the act of 1840, above referred to, does not cover such a policy, and that the same was nothing more or less than a chose in action in the hands of the wife, which she might assign or dispose of at pleasure. In support of this theory he refers to the phraseology of the policy, calling attention to the fact that it is made in favor of the respondent, her *executors, administrators or assigns*, and that there is no reference in the instrument to the act of 1840.

This act, it has been held, looks to a provision for a state of widowhood and for orphan children, which the policy in question does not seem to contemplate, and for which it does not expressly provide. The statute of 1840 does not prescribe the terms of the policy to be issued thereunder, and, therefore, the intention of the parties thereto is a question of fact to be ascertained by the court, when, by the terms of the policy, it is not clear whether it was issued for the benefit of a wife, as a wife, or as a creditor, or in some other capacity in which she may have an insurable interest.

By the common law a person could insure only the interest which he had in the life of another, and not beyond the value of such interest. The act of 1840, as amended by act of 1858 (*chap.* 187), act 1862, (*chap.* 70), act 1866 (*chap.* 656), act 1870 (*chap.* 277), enable a married woman to insure, for her sole use and benefit, the life of her husband for *any definite period*, or *for the term of his natural life*. If she survived such period or term, the insurance money would be payable to her for her own use, free from all claims of the representatives or creditors of her husband (*Eadie agt. Slimmer*, 26 *N. Y.*, 9).

By the act of 1866, chapter 656, the insurance, in case of the wife's death before the period at which it became due, might be made payable to her husband or their children, or their guardian, if minors.

In *Barry agt. The Equitable Life Insurance Company* (59 *N. Y.*, 587), the doctrine of the non-assignability of

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a policy, issued under the act of 1840, is maintained. In each of the cases above cited, however, there was a reference to the act, or an express use of its terms in the policies, to show the intention of the parties thereto. The case of *Wilson agt. Lawrence* (13 *Hun.*, 238, *affirmed by court of appeals*), is nearer in point. The policy in that case contained no reference to the act in terms, but recites payment of the first premium thereon by the wife, and was therein made payable to the wife, her executors, administrators or assigns. It was held, that such a policy on its face would have been a valid contract with the wife at common law. The trial court found that the policy was issued upon the husband's application, and that he paid all the premiums. "These circumstances" (say the appellate court) "and the fact that the policy was not payable till his death, warranted the further finding that the husband designed the policy as a provision for the support of his wife during widowhood." "That no provision is made for children does not militate against the statute, for there was no evidence that they had children." The policy last mentioned was held to be within the statute.

Applying the facts and rulings in this case to the one at bar, we find the following points of contact:

1st. The policy was issued in the name of the wife, and contains a recital that the first premium was paid by her.

2d. The insurance money was made payable to the wife, her executors, administrators or assigns.

3d. The policy was issued on application of the husband, who paid the premiums therefor, other than the first premium.

A distinction now arises between the cases cited, and that under consideration. In the former the insurance was for the life of the husband; in the case before us it is limited to a fixed period, and liable to an earlier termination by the death of the husband. The question then occurs, can an act, construed and intended to make provision for a state of widowhood and orphanage, be invoked in a case where there is a possibility that such a state of domestic relations may not

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exist during the running of the policy? If the plaintiff, her husband and their children outlive May 12, 1883, will the object of the statute be met in an application of its provisions to a state in which there is neither widowhood nor orphanage?

The act of 1840 authorizes an insurance in behalf of a married woman during the natural life of her husband, or *for any definite period*. This latter provision must have some significance, as used, in contradistinction to that of *natural life*. The judge who tried the cause found, among other matters of fact, that the policy in dispute was taken out by the husband of the plaintiff with the object of securing a provision and maintenance for his wife and children in accordance with the provisions of the act of 1840, and the amendments thereto, and not for any other purpose; that there were children of the marriage between plaintiff and her husband living at the time of the issuance of the policy, and that plaintiff and her husband are still living.

Upon the testimony and findings taken in connection with the legal fact that the statute authorizes an insurance by a wife upon the life of her husband for any definite period as well as for life, I am of opinion that the policy in question in this case should be regarded as a life policy, to all intents and purposes, during its continuance, and therefore non-assignable, and that the judgment appealed from should be affirmed.

DALY, Ch. J., and VAN BRUNT, J., concurred.

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SUPREME COURT.

DAVID GIRVIN agt. WILLIAM HICKMAN and another,
executors, &c.

Guardian's bond — when and how action upon may be maintained — Complaint — Answer — Demurrer.

When a pleading is demurred to, the pleading to which it professes to be an answer, may be attacked, and if insufficient to constitute an answer, judgment may be directed accordingly.

Where, on the appointment of a guardian to an infant by the surrogate, a bond with sureties is taken, pursuant to the statute, for the faithful performance of the guardianship, and to render an account, &c., an action cannot be maintained upon the bond of the guardian, until the liability of the guardian be made to appear by an actual accounting outside of judicial proceedings, or as the result of such proceedings.

But where the bond of the guardian is so full and specific, that the rights of the parties can be determined by it alone, without resort to facts *aliunde*, it is not necessary to allege or prove an accounting by the guardian before holding the surety liable upon the bond.

Monroe Special Term, October, 1879.

THIS is an action on a general guardian's bond, given by him on his appointment as such, by the surrogate of Monroe county. The condition of the bond was in conformity with the provisions of the statute, relating to the appointment of a guardian by surrogate.

The plaintiff was also a legatee, under the will of his mother. The legacy was of the value of \$450 and over. The legacy was paid over by the surrogate to the guardian. Before such payment was made, the surrogate required the guardian to give security to the plaintiff, then a minor, for the faithful application and accounting for such legacy as provided by statute; and, accordingly, a further condition was inserted in the bond. The guardian had died previous to the commencement of the action. This suit was instituted by the plaintiff,

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who had arrived at full age, against the representatives of one of the sureties on the bond, for a breach of its condition. The defendant set up several defenses to the action. Among others — the eleventh and twelfth — were, that the plaintiff made no demand upon the guardian, or his estate, for a settlement of the accounts between such guardian and ward, and that no such settlement was had; that the action accrued to the plaintiff in Canada, and out of the jurisdiction of this court; that the plaintiff did not give notice to the defendants, or their testator, of the breach of the bond, and made no demand upon defendants till the presentation of his verified claim against the estate of defendant's testator. That the estate of the guardian is solvent, and able to pay plaintiff's claim arising from the breach of the bond, and plaintiff has neglected to proceed to collect the same of the estate of the guardian.

The plaintiff demurred to these defenses.

The substance of the condition of the bond, for the breach of which the action was commenced, appears in the opinion.

DEMURDER by the plaintiff to the eleventh and twelfth defenses of the answer.

Daniel B. Beach, for plaintiff.

C. H. Gorham, attorney, and *John W. Stebbins*, counsel, for defendants.

MACOMBER, J. — Inasmuch as the counsel for the defendants urge, with much vigor, that the complaint of the plaintiff does not state facts sufficient to constitute a cause of action, it becomes necessary to examine that pleading before determining whether the answer, as contained in the eleventh and twelfth defenses, is sufficient in law to constitute a defense, for when a pleading is demurred to the pleading to which it professes to be an answer may be attacked, and if insufficient

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to constitute a cause of action judgment may be directed accordingly (*People agt. Booth*, 32 N. Y., 397).

The complaint alleges that the plaintiff is the sole residuary legatee under the last will and testament of Sarah J. Girvin (which was admitted to probate on the 15th day of October, 1855), by which he was entitled to a legacy of the value of \$450 and upwards, to be paid to his general guardian, George Linfoot; that the legacy was accordingly paid to the guardian on the 23d day of February, 1858; that the sureties upon the guardian's bond were James McIntosh and John Bliss. A copy of the bond is annexed to the complaint.

That the guardian did not, at any time, render any account of the moneys or property received by him, or of the application thereof, or of his guardianship in any respect, although often requested to do so, but that, on the contrary, he wrongfully converted the said legacy, except the sum of seventeen dollars, to his own use. That the said John Bliss, one of the sureties, died on the 11th day of March, 1876, leaving a last will and testament, which was admitted to probate on the 3d day of April, 1876, and upon which letters testamentary were issued to the defendants. That this claim of the plaintiffs was presented to one of the defendants on the 5th day of April, 1879, accompanied with an offer to refer the claim pursuant to the statute, and that the defendants rejected the claim, and refused to join in a reference thereof.

From this summary of the facts set forth in the complaint, it is seen that, by the action, this plaintiff having attained his majority, seeks to recover from the personal representatives of a surety on the bond of the plaintiff's guardian, the amount of money and property coming to his hands, concerning which the guardian never rendered an account, but which was wrongfully converted by the guardian to his own use.

It will be observed that there is not an allegation of an accounting between the guardian and ward, either with or without the intervention of a court, nor an allegation that any proceedings at law have been taken against the principal.

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In the case of *Stillwell agt. Mills* (19 *John.*, 304), it was held that an action could not be maintained upon the bond of the guardian, until after the accounts had been settled by the parties, or there had been some proceedings against the guardian in the court of chancery. That was the case of a general guardian appointed by the surrogate, as is also the case before me.

In *Salisbury agt. Van Hoesen* (3 *Hill*, 77), which arose upon the appointment of a guardian in proceedings to sell an infant's real estate, it was held that the bond could not be prosecuted until proceedings for an accounting had been taken against the guardian in chancery, or the amount otherwise ascertained by the principals.

The case of *Cuddeback agt. Kent* (5 *Paige* 92) held that the sureties of a guardian appointed for the sale of infant's real estate might be joined with the guardian as defendants in a bill in chancery charging him with a breach of trust, and with having wasted the property intrusted to his care, and praying for an account and satisfaction of what might be found due; and that it is not necessary that a decree should have been first obtained against the guardian alone before proceeding against him and his sureties jointly; and that the court could make a decree in such a suit for the payment by the guardian of the amount found due upon the accounting, with a decree over against the sureties, to the extent of their liability, if the whole could not be collected of the principal debtor.

The case last above cited was supposed, by judge BRONSON, who delivered the opinion in *Salisbury agt. Van Hoesen* (*supra*), to be inconsistent with the decision in *Stillwell agt. Mills*. I do not so understand it. As it seems to me there is nothing inconsistent in the positions taken by those three cases, for in *Cuddeback agt. Kent* the court, with its plenary equity powers, was careful to provide that the judgment, which might ultimately go against the sureties, should not become effective until, not only the extent of the liability of

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the principal, but his ability to pay as well had been ascertained. This, in legal effect, is no more than was decided in the case preceding it, and in the case following it, already alluded to. In them all is discernible, the principle that, in the ordinary undertaking of the surety for the faithful discharge of his duties by the guardian, the liability of the guardian "must be made to appear by an actual accounting outside of judicial proceedings, or as the result of such proceedings, though the remedy against the sureties in a proper case may be pursued in the same suit which seeks to establish the amount of the liability of the principal.

The case of *Brown agt. Snell* (57 N. Y., 286) also recognizes the principle that before the surety can be required to pay, the extent of the liability of his principal must first be ascertained either by judicial proceedings or otherwise.

Such being the well established rule of law, founded on decisions which I am not at liberty to disregard, it follows that the complaint in this case is fatally defective in the particulars stated, unless the condition of the bond in suit is substantially different from those in the foregoing cases.

The material part of the bond is as follows: "The condition of this obligation is such that if the above bounden, George Linfoot, about to be appointed by the surrogate of Monroe county guardian to said David Girvin, shall faithfully, in all things, discharge the duties of a guardian to the said David Girvin according to the laws of the state of New York, and render a true and just account of all money and property received by him, and of the application thereof, and of his guardianship, in all respects, to any court having cognizance thereof when thereunto required." [To this point the bond is, in substance, the same as were given respectively in the cases cited, and if it was the whole of the obligation an allegation would be required that an accounting, or something equivalent to it, had been had, either with or without the intervention of a court, in order to render the complaint sufficient in law. But the bond proceeds.] "The further

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and other condition of this obligation, is such that, whereas, on the settlement of the accounts of John Green and Sarah Bliss, executor and executrix of the last will and testament of Sarah J. Girvin, deceased, certain moneys and notes and accounts uncollected belonging to said estate, and by said surrogate decreed to be in the hands of said executor and executrix, which are to be brought into the office of said surrogate, and which, by said last will and testament, are bequeathed to said David Girvin; and, whereas, said surrogate is about to direct said moneys and notes and accounts to be paid and delivered over to said George Linfoot, said general guardian; now, therefore, if the said George Linfoot shall faithfully, in all things, *apply said legacy, consisting of said moneys, notes and accounts*, and account for the same when thereunto required, then this obligation to be void and of no effect, otherwise to remain in full force and virtue." Here, then, is a case of an ascertained legacy, consisting of money, notes and accounts, which, as this bond itself says, were bequeathed to David Girvin. By the decree of the surrogate on the settlement of the accounts of the executors of the last will and testament of Sarah R. Girvin, these were brought into court for delivery to the legatee, but being a minor he could not receive them so as to discharge the executors from further liability thereon. The guardian undertook to "apply said legacy," which means that he will turn over the same to the legatee when the latter becomes of age, instead of which, notwithstanding a demand, he has converted them to his own use. In a literal and technical sense, therefore, no accounting was needed either (1) to ascertain how much property the guardian had received, or (2) to show what he had done with it; for both were determined by the terms of the bond itself. In other words, the bond is so full and specific, that the rights of the parties can be determined by it alone, without resort to facts *aliunde*. In such a case, in my judgment, it is not necessary to allege or prove an accounting by the guardian, before holding the surety liable upon the bond.

McEncroe agt. Decker.

It is not necessary, I apprehend, to consider at length whether the eleventh and twelfth defenses, set forth in the answer are sufficient in law, for it is manifest, on inspection, that neither of them contains matter which constitutes a defense; the only way of sustaining them, is by attacking the sufficiency of the complaint, as was done by the counsel on the argument, though ineffectively as already shown.

The demurrer is well taken and must be sustained, with costs.

SUPREME COURT.

McENCROE agt. DECKER

Answer — effect of a verified answer upon a hearing of a contested application for an injunction — Effect of a denial of the allegation of the complaint, except as afterwards admitted to be true — Code of Civil Procedure, section 630.

In an action for a dissolution of a copartnership, it is almost a matter of course to grant an injunction and appoint a receiver.

Under section 630 of the Code of Civil Procedure, upon a hearing of a contested application for an injunction order, or to vacate or modify such an order, a verified answer has the effect only of an affidavit.

Under this section the court has the power to determine the weight to be given to the denial contained in the answer, in the same manner and to the same extent as it has to determine other questions arising upon conflicting affidavits.

Where the answer alleged that "the defendant denies each and every allegation in the complaint contained, and not hereinafter specifically admitted or denied, or not hereinafter specifically admitted or avoided:"

Held, that a denial in this form is neither a general or specific denial, and is a form of denial in no way provided for by the present system of pleading.

Special Term, November, 1879.

L. L. Kellogg, for plaintiff.

Burton N. Harrison and A. Monell, for defendant.

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LAWRENCE, J.—If the agreement with Greenfield was not usurious, it certainly bears very much the appearance of being so, and I do not feel authorized on affidavits to declare that it is not usurious, even although the affidavits strongly deny the usury. The allegations of the plaintiff as to the insolvency of Greenfield and Decker do not seem to be denied by the defendants.

This being an action for a dissolution of a copartnership, it is almost a matter of course to grant an injunction and to appoint a receiver; and I am satisfied that the rights of all parties require that the injunction should be continued until the cause can be tried.

If it be contended that all the equities of the complaint are denied, the answer is two-fold — first, that under section 630 of the Code, upon a hearing of a contested application for an injunction order, or to vacate or modify such an order, a verified answer has the effect only of an affidavit.

This provision is stated by Mr. Throop, in his note, to have been designed to settle, in accordance with the weight of the authorities, the questions which have arisen in regard to the effect of an answer denying the equity of the complaint.

Under this section the court has the power, in my opinion, to determine the weight to be given to the denials contained in the answer, in the same manner and to the same extent as it has to determine other questions arising upon conflicting affidavits.

Second. The answers allege that “the defendant denies each and every allegation in the complaint contained, and not hereinbefore specifically admitted or denied, or not hereinbefore specifically admitted or avoided.”

A denial substantially in this form was held by the general term of this court in the case of *Chamberlain agt. The American National Life and Trust Company*, in May, 1877, to be neither a general or specific denial, and to be a form of denial in no way provided for by the present system of pleading (See, also, *People agt. Snyder*, 41 N. Y., 397 and 400;

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People agt. Northern Railroad Co., 53 Barb., 98 and 122; and same case in court of appeals, 42 N. Y., 217).

Assuming this denial to be bad, very many of the allegations on which the plaintiff rests his claim to an injunction, and on which his right to an injunction depends, are left uncontradicted and undenied.

If, as a matter of fact, the work is now being proceeded with, the appointment of a receiver would protect the interests of all parties. If it has been stopped because it cannot be prosecuted at this season of the year, there will be no necessity for such an appointment, because the case can be tried at the January or the February special term. But as the appointment of a receiver is not asked for in the order to show cause, it is not necessary on this motion to pass upon the propriety of adopting that course.

The injunction is continued, with ten dollars costs to the plaintiff, to abide the event.

N. Y. COMMON PLEAS.

ANN DONNELLY, administratrix, &c., plaintiff and respondent,
agt. EDWARD O. JENKINS *et al.*, defendants and appellants.

Negligence—when tenants of building not liable for accident occurring to party by walking into elevator, and falling to ground floor—Contributive negligence.

Where there is an elevator in the hallway of premises used by different tenants in common, which is inclosed, and has doors opening into the hallway on the first floor, upon which doors there are bolts for the purpose of fastening them, and a servant of a third person, lawfully on the premises, delivering goods to one of the tenants of the upper floors, mistakes the elevator for the stairs and walks into it, and falls through the aperture to the ground floor, receiving injuries which result in his death:

Held, in an action brought by his administratrix, that, as the elevator was properly constructed and properly protected, the tenants on

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one floor are not liable for the negligent manner of use of the hatchway by the tenants on one of the other floors, and there being no affirmative proof showing specific acts of negligence on the part of any particular tenant, neither of the several tenants is liable, either severally or jointly with the others, for injuries resulting from such accidents.

General Term, January, 1880.

In February, 1873, the defendants were tenants of the building 233 William street, New York city.

The defendants, Dunham & Russell, were bookbinders, and tenants on the floor above the street. The defendant Jenkins was a printer, and tenant of the upper floors.

There was an elevator in the hallway of these premises, which was used by the tenants in common, and which was encased and had doors opening into the hallway, on the first floor, upon which were bolts for the purpose of fastening them shut.

On the 23d of February, 1873, John Donnelly, who was in the employ of the New York Printing Company, as their servant, came to deliver goods to Dunham & Russell, and, in some way, fell through the elevator hatchway into the lower floor, and was so injured that he subsequently died.

No one saw the deceased enter the building, or fall through the hatchway. Just at one side of the elevator is a stairway, which is partially concealed when the doors leading to the elevator are open, and it seems to be probable that the elevator doors had been left open, and the deceased, mistaking the elevator for the stairs, walked into it and fell through. This action is brought by the administratrix of the deceased against Dunham & Russell and Edward O. Jenkins, to recover damages, &c.

Theo. F. Miller, for defendants Dunham & Russell.

Wm. H. Arnoux, for defendant Jenkins.

Geo. H. Hart, for plaintiff.

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VAN BRUNT, *J.* — We cannot hold, under the evidence in this case, that the maintenance of this elevator in the building was, in itself, a nuisance. The evidence shows that the elevator was properly inclosed, and that it was provided with doors which were to be kept shut when the elevator was not in use, and which were a reasonably effectual protection against accidents; and if, under the circumstances of this case, the deceased opened the door of this elevator before he fell through it he undoubtedly was guilty of contributive negligence. If the doors were shut the stairs were in full sight, and he knew of the fact of an elevator being there as he had been upon the premises for the delivery of goods some three times before. If, however, the elevator door was left open it partially concealed the stairs, and the deceased may have naturally made the mistake in supposing that the door to the elevator was the door to the stairway. In such a case the negligence by which the deceased lost his life would be the leaving the door of the elevator open. It seems to be reasonably clear that as the elevator was properly constructed and properly protected for accidents arising from negligent use, the defendants Dunham & Russell would not be liable for the negligent use of the hatchway by Jenkins, and *vice versa*. In the case of *Totten agt. Phipps* (52 *N. Y.*, 354) the defendants had entire and exclusive charge of the trap-door, and had been accustomed to shut it down in the evening. The deceased was a tenant of the upper floors, and had an easement over the hallway in which this trap-door was situated. In the night going to his premises, the trap door being left open, the deceased fell through and was killed. The court held that the deceased had a right to assume that the trap-door was, as usual, closed, and that going upon the premises, as he had a right to do, at night, he was not guilty of negligence in acting upon that assumption, and that the defendants were guilty of negligence in leaving the trap-door open.

That case is distinguishable from the one at bar, in the fact that, in the case cited, the defendants, who were members of

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one firm, had exclusive control of the trap-door, as it was used only by them, and, if it was left open, it must have been so left by them; whereas, in the case at bar, Dunham & Russell and Jenkins are different parties, the one in no way liable for the negligence of the other. If Dunham & Russell left that elevator door open, then they alone are liable, and if Jenkins left that door open, then he alone is liable. There being no evidence in this case by whom the door was left open, I am unable to see how the jury could be allowed to speculate and fix a liability upon either or all of the defendants, as their fancy might dictate.

If either of these defendants used that elevator exclusively, then, if this door was left open, we might legitimately infer that it had been left open by such defendants. In the absence of all proof upon the subject, I am unable to see how we can say that this or that defendant was guilty of negligence. I am of the opinion, therefore, that there was no evidence showing the defendants guilty of negligence, and the judgment must be reversed, and a new trial ordered, with costs to abide event.

C. P. DALY, chief justice, concurred.

SUPREME COURT.

CAROLINE M. WEBER agt. LEWIS WEBER and others.

Voluntary trusts — when they will not be enforced.

Where a father deposited his earnings in a savings bank, in his own name, as trustee for his children severally, in sums to draw the largest interest, but, under circumstances which make it clear that he did not intend thereby to part with his ownership of, or interest in, the moneys, or the right to control the same:

Held, that no such trust was created by such deposit, in favor of the children, as would enable them to take the same from the control of their father.

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Also, that whether a trust was created was a question of fact, in determining which the court would give effect to the purposes and objects which the settler had in view in making the deposits.

Special Term, November, 1879.

G. L. Wilkes, for plaintiff.

Cook and Schuck, for defendants.

VAN VORST, *J.* — The question involved in this action is important, but it was my impression at the close of the trial that the action could not be maintained, under the evidence, and reflection since has confirmed that idea.

The pass books of the savings bank, issued to the defendant on the deposit by him of his own money, afford the only evidence to establish the trust contended for. But the circumstances under which the accounts were opened do not lead to the conclusion that the defendant intended absolutely to part with his title and ownership of the moneys in question, and I do not think he has.

Whether a voluntary trust or settlement is created or not, is a question of fact in each case, and the court, in determining the fact, will give effect to the purposes or objects which the settler had in view in making the disposition (*Perry on Trusts*, sec. 99; *Jones agt. Locke, L. R.*, 1 Ch., 25).

Under the case of *Martin agt. Funk*, in the court of appeals, the opinion in which, delivered by the chief justice, has been handed up, upon a consideration of the bank books only, and the form in which the deposits were made, the trust would doubtless be established. But the learned chief justice says, that he had considered the case upon what appears upon the face of the transaction, without evidence bearing upon the intent, and I understand him to say, "that surrounding circumstances may be shown to vary or explain the apparent character of the acts, and the intent with which they were done."

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In *Jones agt. Locke (supra)* lord CRAWFORTH said: "The case turns on the very short question, whether the father intended to make a declaration that he held the property in trust for the child." The intent, therefore, of the defendant, at the time he made the deposits, gathered from his words and acts, together with the circumstances under which the deposits were made, must needs be considered, to determine the true character of the transaction.

The moneys which the defendant deposited in the savings bank, apparently in trust for his children, had been earned through many years by his own labor, and were the results of savings begun, as to a portion of it, when he was fifteen years of age.

The deposits are entered in four separate books, all issued by the same savings bank. In one book the form of the entry is "Lewis Weber, in trust for Caroline M. Weber;" in another, "Lewis Weber, in trust for Carrie M. Weber." The remaining books contain similar entries in favor of Weber, in trust for two other children. Defendant, upon the trial, gave, in substance, the following account of the origin of these separate deposits, and the reasons for making them: The money, some \$800 in gold, which he had before deposited in Philadelphia, where he had saved it, was sent to him in New York, and he took it to the "Bank for Savings," desiring to deposit it for safe-keeping. The bank clerk told him that he must divide up the amount and keep it in separate sums, under \$500, and it would draw more interest. Defendant thought of different names in which to place it, his father, his mother, and finally deposited in his own name, in trust for his children, and it has so remained ever since. He wished the bank to understand that it was his money, and was informed that it was his, no matter in whose name it was deposited. He stated that he did not wish to place it in anybody's name, but had no objection to letting his children have it after his death; but he wanted to keep it in the bank, he, however, to control it so long as he lived. Some

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of the moneys deposited he afterwards drew out, and he redeposited other moneys. The moneys, which now reach the aggregate sum of \$2,000 in the four books, to which should be added interest for several years, have been accumulating in this way for a period of twenty-seven or twenty-eight years, during which period the books, when written up, have been from time to time renewed by him.

An unhappy separation seems to have taken place in the family. The defendant's wife and two of the children refuse to live with him, the other child remains with him. The origin of this unfortunate condition does not clearly appear, and perhaps it would throw no light upon the legal question if known. The defendant testifies that he has applied to his wife to live with him, and that she has refused.

One of the daughter's, an adult, has already prosecuted her father to recover the money so deposited in trust for her. But it did not seem to the judge before whom the trial was had, that she was entitled to the money, and that the evidence did not establish that the defendant intended to create a trust in favor of the daughter by the deposit of the moneys in the savings bank.

An application has also been made in the court of common pleas for the removal of Weber, the defendant, as trustee, upon similar grounds to those urged in this action; but the learned chief justice of that court doubted whether there was that complete and perfect declaration of trust in favor of the children which was irrevocable, and made Weber thereafter simply a trustee for the children; and the application was denied upon the grounds that the uncontradicted statements were not sufficient to justify the court in holding that such a trust was established as the applicant claimed.

Finally, this action is commenced by the plaintiff, one of the daughters, who is an infant, by her mother as her guardian, who claims that the defendant holds the moneys in trust for her benefit; that he is pecuniarily irresponsible; that he be removed and a new trustee be appointed in his place, who

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shall invest the money for her benefit. A similar action is pending in this court in behalf of the other daughter.

Upon consideration of all the evidence, and by giving effect to the intentions of Weber in making the deposits, and the reasons expressed at the time the same were made, I cannot conclude that Weber absolutely deprived himself of the moneys, or the right to control and use and apply the same at his volition.

If the literal construction of this transaction, as presented by the entries in the bank books, establish an irrevocable trust in favor of the children, the same is the result of a mistake upon the part of Weber, to which, in equity, he should not be held.

It is unreasonable to suppose that Weber should intentionally strip himself of all his money, the fruits of his daily toil during his previous life, and place it wholly beyond his reach to supply therefrom his own wants when lack of employment, sickness or advancing years might deprive him of the means of supporting himself and family, and constitute himself simply a trustee for his children over his own means, thus putting himself entirely dependent upon their continued affection or generosity. Equity will not aid children in the attempts to impoverish a parent, and would reluctantly enforce a voluntary trust by which the settler would be wholly denuded although his children are the beneficiaries.

I have no idea that Weber supposed that, by making the deposits in the form in which they were made, he was putting it in the power of his wife and children, by ceasing to live with him, to prosecute him for the money, or to apply to the courts to deprive him of its control.

As a ground for removing him from the position of trustee, in which it is claimed by the plaintiff that defendant has placed himself, it is urged that he is pecuniarily irresponsible. If that be so, it is because he has voluntarily given away these moneys; and it is scarcely kind in the beneficiaries to urge this as a reason for depriving him of the control of that which

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he had the industry to earn and the prudence to save, and which his affection for his children even now compels him to say they shall have at his death.

Upon the facts of this case I do not think the trust is established, and I conclude that the plaintiff is not entitled to the relief demanded, or any relief in the premises, and that her complaint be dismissed upon the merits.

In the Matter of the Proceedings against JOHN JAY
DICKINSON.

Witness — County treasurer subpoenaed before a board of supervisors of a county, pursuant to the provisions of section 8, chapter 190, Laws of 1858, when not compelled to answer questions put to him.

A county treasurer who appears before a committee appointed by the board of supervisors of a county, in obedience to a subpoena issued by the chairman of such committee, in accordance with the provisions of section 8 of chapter 190 of the Laws of 1858, cannot be compelled to answer interrogatories concerning moneys in his hands as county treasurer, when he claims that such answers might subject him to a criminal prosecution, or to a penalty or forfeiture.

The witness is exempt from answering because, by the Revised Statutes (vol. 8 of 6th edition, page 671, section 171) and the common law, no witness can be required "to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture."

The act of 1858, under which these proceedings are had, does not prevent the evidence to be given by the witness from being used by the governor for his removal, and, therefore, the rule that a witness "is not bound to speak when the answer may subject him to a forfeiture, or any thing in the nature of a forfeiture, of his estate or interest," applies and exonerates the witness from answering the questions propounded. *Quare*, as to the constitutionality of the statutes conferring the power on boards of supervisors or its committees to compel the giving of testimony (*See Matter of Pillsbury*, 56 How., 290).

Special Term, December, 1879.

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APPLICATION to judge WESTBROOK to punish Dickinson for contempt in refusing to answer certain questions put to him by a committee of the board of supervisors of Schoharie county.

Mr. Krum, for application.

Mr. Mayhem, opposed.

WESTBROOK, J. — Dickinson is the county treasurer of Schoharie county. At its annual session in 1879, the board of supervisors of that county appointed a standing committee on the county treasurer's accounts. Upon a special report of such committee it was authorized by the board of supervisors, under section 3 of chapter 190 of the Laws of 1858, to send for persons and papers, and to examine the county treasurer's accounts.

The county treasurer, in obedience to a *subpoena* issued by the chairman of the committee, appeared before it, but declined to answer certain questions concerning the moneys received by him, upon the ground that the answers would tend to convict him of a crime or subject him to a penalty or forfeiture.

Under section 4 of the act aforesaid an attachment was issued by the judge writing this opinion, and on December 18, 1879, Dickinson was brought before such judge, and the question presented is, could Dickinson be compelled to answer interrogatories concerning moneys in his hands as county treasurer, when he claims that such answers might subject him to a criminal prosecution, or to a penalty or forfeiture.

Section 6 of article 1 of the Constitution of this state, which declares that no person "shall be compelled, in any criminal case, to be a witness against himself" is clearly inapplicable, because the proceeding before the committee was not a "criminal case." This is too plain for argument.

It was further urged, however, that the witness was exempt

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from answering because, by the Revised Statutes (*vol. 3 of 6th edition, page 671, section 117*) and the common law, no witness can be required "to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture."

In *People agt. Haskley* (24 N. Y., 73, *see pages 82, 83*) it was held that if there was no statute provision protecting the witness against the effects of his testimony he could not be compelled to answer, but when he was protected he could not decline to respond.

By section 9 of chapter 190 of the Laws of 1858 (that under which the examination was sought to be made) it is provided: "But the testimony of any witness examined under the provisions of this act shall not be given in evidence or used against him on the trial of any indictment or criminal prosecution, other than for perjury committed on such examination."

The counsel for the county treasurer insists that the evidence given before the committee of the board of supervisors could be used against him before the governor on a proceeding to remove him from his office, under chapter 436 of the Laws of 1877, whilst the counsel for the supervisors argues that it could not be, because the proceedings before the governor is "a criminal prosecution."

I am unable to agree with the learned counsel for the supervisors, that a proceeding by the governor, for the removal of a delinquent county treasurer, is "a criminal prosecution." Sections 4, 5 and 6 of the old Code (they are unrepealed) do not apply to a proceeding by the governor against a public officer, and this is clearly shown by section 1, which divides remedies in the "*courts of justice*." Any action which the chief executive of the state may take for the protection of the people, by the removal of a public officer, is neither a civil or criminal prosecution, both of which must be originated and prosecuted in the courts. This is not only apparent, it seems to me, from the nature of the acts, and section 1 of the Code, but the definition of "a criminal

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action," by section 6 thereof, also involves it. That section reads: "A criminal action is prosecuted by the people of the state, as a party, against a person charged with a public offense, for the punishment thereof." In a proceeding by the governor, under the act of 1877, the people do not appear "*as a party*," nor is it "*for the punishment*" of an offense. It is true that the person removed from office may suffer a loss by the removal, but that loss is not inflicted as a "punishment," but to protect the public against official misconduct. Other statutes exist to punish malfeasance in office, which are enforced through the courts, but the governor, though in certain cases and for certain purposes he must exercise judicial functions, has no power, either constitutional or statutory, to convict and punish for crime. That power rests with the judiciary only. Neither, as has already been said, are the people "a party" to the proceeding for the removal. It is an executive act, which though founded upon complaint, is *by* the executive, to which there is no formal prosecuting party on the record. The law regards the governor as the initiator of the action for the protection of the people, though individuals may have called his attention to official misconduct.

It seems to me entirely clear that the act of 1858 does not prevent the evidence to be given by Dickinson from being used by the governor for his removal, and that, therefore, the rule laid down in *Henry agt. Salina Bank* (1 N. Y., 83, page 86), that a witness "is not bound to speak when the answer may subject him to a forfeiture, or *any thing in the nature of a forfeiture* of his estate or interest," would exonerate the witness from answering the questions propounded.

The conclusion I have reached renders the examination of the question of constitutional power in boards of supervisors, or its committees, to compel the giving of testimony unnecessary. The constitutionality of the statutes conferring it was somewhat questioned by me in *Matter of Pilebury* (56 Howard, 290), and upon it no opinion is now expressed,

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further than to say that it involves a question worthy of most serious discussion.

The attachment will be discharged upon the sole ground that Mr. Dickinson cannot be compelled to answer the questions propounded by the committee of the board of supervisors, for the reasons hereinbefore stated.

SUPREME COURT.

ALICE DOUGLAS, appellant, agt. WILLIAM T. WARREN,
respondent.

ALICE DOUGLAS, appellant, agt. JOSEPH L. HABERSTRO, as
sheriff, &c., respondent.

Action against sheriff for an escape — Liability therefor — How he may exonerate himself — What is a second escape — A coroner cannot act in the place of the sheriff in holding the prisoner — Code of Civil Procedure, sections 172, 587, 589, 595, 591, 592.

Where an action was commenced by plaintiff against the defendant and he was arrested by the sheriff, who took from him an undertaking signed by two sureties, who failed to justify on being excepted to:

Held, that upon the failure of the sureties to justify the sheriff became liable as bail. The sureties were not liable thereafter as bail, but they remained liable to the sheriff for all damages which he might sustain by reason of their omission to justify.

Where the sheriff is liable as bail he has all the rights and privileges, and is subject to all the duties and liabilities of bail. One of the rights and privileges of bail is, that they may surrender the defendant in their own exoneration. Such surrender, however, must be made to the sheriff.

When the sheriff seeks to exonerate himself from liability as bail by surrendering the defendant, he must rearrest him and surrender him to the custody of the jail. He cannot exonerate himself by surrendering him to the coroner, as the coroner has no right to receive him or to detain him in custody.

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It is only when the sheriff is a party to the action, in which the order of arrest was issued, that the coroner is authorized to act.

Fourth Department, General Term, June, 1879.

. APPEAL from an order of the Erie special term, in both of the above entitled actions, exonerating the sheriff, the defendant in the second action, and the bail put in by the defendant in the first action, from liability in said actions, upon paying the costs of the second action, and the costs of opposing the motion, and ordering the said second action to be discontinued on payment of said costs.

John Campbell Hubbell, for appellant.

George W. Othren, for respondents.

SMITH, J. — The plaintiff commenced an action against the defendant, Warren, and caused him to be arrested by the sheriff, Haberstro.

The sheriff took from him an undertaking signed by two sureties, who failed to justify on being excepted to by the plaintiff. The plaintiff obtained a judgment against Warren, and an execution against his property was returned unsatisfied, and one against his person, that he could not be found. The second action was then commenced against the sheriff. During its pendency, and within twenty days after its commencement, the bail in the first action surrendered the defendant, Warren, and the sheriff received him into his custody. Instead of keeping him, the sheriff surrendered him to one of the coroners of the county of Erie, who permitted him to go at large on giving a new undertaking. Thereafter, the sheriff and the bail in the first action gave notice of the motion, which resulted in the order from which this appeal is taken.

Upon the failure of the sureties, in the first undertaking, to justify, the sheriff became liable as bail (*Sec. 587 of Code of*

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Civil Procedure). The sureties were not liable thereafter as bail (*Clapp* agt. *Schutt*, 44 *N. Y.*, 104), but they remained liable to the sheriff, for all damages which he might sustain by reason of their omission to justify (*Sec. 589, Code Civil Procedure*). Section 595 of the Code of Civil Procedure provides, that when the sheriff is liable as bail, he has all the rights and privileges, and is subject to all the duties and liabilities, of bail. One of the rights and privileges of bail is, that they may surrender the defendant in their own exoneration (*Sec. 591, Code Civil Procedure*). But, by the express terms of the statute, the surrender must be made to the sheriff (*Code Civil Procedure, secs. 591, 592*). When the sheriff seeks to exonerate himself from liability as bail, by surrendering the defendant, he must rearrest him, and surrender him to the custody of the jail (*Santos* agt. *Merceques*, 9 *How. Pr.*, 188; *Brady* agt. *Brundage*, 59 *N. Y.*, 310). The sheriff seems to have supposed that it was his duty to surrender the defendant to the coroner. But he was under no such duty, and the coroner had no right to receive him or to detain him in custody. There was no order of arrest or process directed to the coroner. The sheriff was not a party to the action in which the order of arrest was issued, and so the case was not within the statute authorizing the coroner to act where the sheriff is a party (*Code Civil Procedure, sec. 172*). The undertaking taken by the coroner was a nullity, and if the sheriff is exonerated the plaintiff is without remedy.

Independently of the other points made by the appellant's counsel, it follows, from these views, that the order appealed from should be reversed.

Order reversed, with ten dollars costs, and disbursements.

Chemical National Bank of New York agt. Kohner.

N. Y. COMMON PLEAS.

THE CHEMICAL NATIONAL BANK OF NEW YORK, plaintiff
and appellant, agt. JETTE KOHNER, administratrix, &c.,
of JOSEPH KOHNER, deceased, defendant and respondent.

*Cashier of a bank — his powers and duties — No legal authority to compromise
a claim of the bank.*

A cashier of a bank has no legal authority, by virtue of his position as such cashier, to compromise a claim of the bank, or to execute a composition agreement and release therefor.

Such a power is discretionary, calling oftentimes for the exercise of considerable reflection and a high degree of judgment. It is strictly a sacrifice at least of nominal property of the bank, and is a function of the board of directors and not of an executive officer.

General Term, January, 1880.

Charles Jones and John E. Roosevelt, for appellant.

B. F. Watson, for respondent.

LARREMORE, J. — In November, 1872, the firm of Griffith & Prentiss made and executed to their own order their four several promissory notes, amounting in the aggregate to \$15,330.20, which said notes were indorsed by said Griffith & Prentiss and Joseph Kohner, the defendant's intestate. When said notes became due the said firm were unable to pay the same in full. At this time said firm were indebted to the Bank of New York and the Central Bank of New York upon notes upon which, also, said Joseph Kohner was indorser. For the purpose of making a composition of their debts with the banks above mentioned Charles Griffith, a member of said firm, in November, 1873, applied to the Bank of New York, through its officers, to compromise the indebted-

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edness of Joseph Kohner to that bank by accepting twenty-five cents on the dollar in satisfactory notes, and was told by the officers to whom such application was made that they would do whatever the Chemical Bank did. A similar application was made to the president of the Central Bank, who replied that "they would have nothing to do with any paper or any note; that any settlement he made would be money; that he would have nothing to do with Mr. Kohner in any form excepting money." Mr. Griffith called at the Chemical Bank and made a similar application. Mr. Williams, the cashier, wrote and delivered to Mr. Griffith the following letter:

"CHEMICAL NATIONAL BANK, }
"NEW YORK, *November 14, 1873.* }

"C. P. LEVERICH, Esq.:

"DEAR SIR. — At the request of Mr. Griffith, I beg leave to say that we propose to take the notes of Jos. Kohner, indorsed by J. A. Goldsmith, for twenty-five cents on the dollar of his indebtedness to us, and discharge him in full when the notes are paid, holding, of course, Griffith for the balance.

"Very respectfully.

"G. G. WILLIAMS,
"Cashier."

This letter was delivered by Griffith to the president or cashier of the Bank of New York, and left there. Evidence was offered on behalf of the plaintiff that Mr. Williams, on the afternoon of November 14, 1873, the same day on which the letter was written, reported this fact to the president of the Chemical Bank, who disapproved thereof, and it was decided not to make the proposed settlement with Kohner, and to notify the Bank of New York of such conclusion; and further, that the next day such notice was given to the Bank of New York before it had acted upon the letter. The referee refused to find the matters of fact above

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stated, as claimed by the plaintiff to have been proven, to which refusal an exception was taken. On December 20, 1873, the claim of the Central Bank against Kohner, and the claim of the Bank of New York against him, were settled on the basis of the agreements respectively made by said banks with Mr. Griffith. On the day last named, a tender was made to the Chemical Bank, through its cashier, of the notes, payable in six months, which notes, it is claimed, were those intended by the letter of November 14, 1873, which the bank refused to accept. On the same day a certified check for an amount equal to that of the notes was tendered to the Chemical Bank, which it also refused to accept. Both the notes and the check thus tendered were subsequently destroyed, no further offer to pay the notes was made, and it has not since been paid.

In April, 1874, this action was commenced upon the four promissory notes hereinbefore mentioned. The complaint sets forth the making and delivery of said notes, their non-payment and protest at maturity, and demands judgment against the defendant for their aggregate sum of \$15,330.20, with interest, protest fees and the costs of the action.

The defendant, in his answer, admits, by not denying, the facts alleged in said complaint, and sets forth, as a defense, the letter of November 14, 1873, by way of accord and satisfaction, in full release of plaintiff's claim. That in accordance with the agreement therein contained, and relying thereupon, the defendant's intestate had settled with his said other creditors on the basis thereof; that he had tendered a settlement to the plaintiff, upon the same terms and in the manner agreed upon, which plaintiff refused to accept, and that defendant has ever since been, and still is, ready and willing, and hereby offers, to pay said proportion of said notes, and therefore prays judgment in his favor.

The action was referred by consent. The referee found judgment for defendant, from which this appeal is taken.

I have examined, with great interest and satisfaction, the

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opinion of the learned referee who tried this action, and, while assenting to most of the legal propositions therein advanced, feel constrained to differ from his conclusion of law upon the question of *estoppel in pais*. It is proper, therefore, that this subject be first considered, for, in my judgment, it is the pivotal point upon which the whole case turns.

What authority had the cashier of the Chemical Bank to write the letter of November 14, 1873, and what liability did said bank incur by reason of said letter?

To accurately define and limit the powers and duties of a cashier of a bank within the compass of an ordinary opinion from the bench, would be unsatisfactory and profitless. Groping through usages that are at variance with each other in different states and institutions, a brief reference to general principles of elementary law will suffice for our present purpose.

It appears to be conceded by all writers on this important subject of banks and banking, that a cashier is the business officer of a bank; but only in the sense of one who transacts, and not of one who regulates or controls its affairs. His duty has reference to daily routine business, and not to matters involving discretionary authority, which belongs, unless delegated, to the board of directors. As has been quaintly said, "they are the mind and he is the hands of the corporation." Another writer likens the directors to the judges, and the cashier to the clerk of a court. The former adjudicate and direct, the latter executes their mandate (*United States agt. Dunn*, 6 *Peters*, 51; *United States agt. City Bank of Columbus*, 21 *How.* [U. S.], pp. 356, 364; *Holmes' C. C.*, 209; *Dabney agt. Stevens*, 10 *Abb. Pr. Rep.* [N. S.], 39; *Adriance agt. Rooms*, 52 *Barb.*, 399).

Such an officer, publicly acknowledged as such, is invested with such power as judicial sanction or banking usages have recognized and acknowledged as belonging to the office he holds, and it is for the court to decide whether or not any particular duty is within his authority. The bank would not

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be responsible for acts of his which are discretionary, semi-official and solely within the prerogative of the directors, though done in good faith, under color of authority, and affecting an innocent dealer (*Morse on Banks and Banking*, pp. 156, 157; *Morse agt. Massachusetts Nat. Bank*, 1 *Holmes C. C. Rep.*, 209).

An enumeration of the general powers and duties of a cashier, as derived from text-books and judicial decisions, may be stated as follows: Collection and payment of debts. Power of borrowing money in ordinary course of the daily business of the bank. Power to draw checks upon its money in other institutions. Power to indorse its negotiable paper. Power to conduct its correspondence. Power to transfer its shares of stock.

It will not be disputed that where a special authority is conferred upon him, or where he acts in conformity with a general usage, or an established acquiescence of his board of directors, the bank will be responsible for such acts, though beyond the ordinary scope of his duties (*Elwell agt. Dodge*, 33 *Barb.*, 336; *City Bank of New Haven agt. Perkins*, 4 *Bosw.*, 420).

But where is the proof, in this case, of authority to compromise a debt, either by resolution, parol or usage? Such a power it is said "is discretionary, calling oftentimes for the exercise of considerable reflection and a high degree of judgment. It is strictly a sacrifice at least of nominal property of the bank, and is a function of the board of directors and not of an executive officer."

All the cases agree in this, but hold that such authority may be delegated.

The decision in *Bank of Pennsylvania agt. Reed* (1 *Watts & S.*, p. 101), while intimating that such an authority might be exercised in a particular case, and under pressure of circumstances and necessity, must, in order to be in consonance with the general principles of law already cited, be construed to refer to a stringent and not an ordinary necessity,

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and the act performed must be one that might be authorized by a usage or a directorial vote (*Watson agt. Bennett*, 12 Barb., 196; *Barrick agt. Austin*, 21 Barb., 241; *Adrianoe agt. Roome*, 52 Barb., 399).

From what source, then, did the cashier of the Chemical Bank derive his authority to release an obligation held by it in favor of the defendant? Certainly not under William's right to conduct the correspondence of the bank for, under such power, he could only communicate its action. We have seen that the right claimed was not within his general powers as cashier, and there is no proof that authority in this respect was ever delegated to him, or of any existing usage on the subject.

If this view be correct it follows that the complaint herein should not have been dismissed.

I think it would be error to hold plaintiff estopped by the letter of November 14, 1873, even conceding, for the sake of argument, that Williams was the plaintiff's duly authorized agent in writing it. At the most it was but a private communication addressed to C. P. Leverich, Esq., in his individual capacity, informing him of what the plaintiff proposed to do in the premises. It was not a composition agreement in which the creditors were named and containing mutual covenants, and in the execution of which the creditors, or some of them, joined as in *Renard agt. Fuller* (4 Bosw., 107) and *Hall agt. Merrill* (15 Bosw., 266), but a letter containing a proposition that might have been revoked before it was acted upon. This the plaintiff sought to do, but the testimony offered upon this point was excluded and an exception taken. Mr. Griffith, one of the defendant's witnesses, was allowed to testify, under plaintiff's exception, to a conversation between himself and the president or cashier of the Bank of New York. The testimony rejected had reference to the subject-matter of this action and should not have been excluded, and the exceptions were well taken.

Another feature of this case should not be overlooked. The defendant in the answer avers and admits that the alleged

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composition agreement is still in force, and that he has been and still is ready and willing, and therein offers to pay the twenty-five cents per dollar of plaintiff's claim in pursuance of such agreement. If this be a fact, and the referee has so found, I am unable to perceive why the plaintiff should not have had a judgment for the amount due upon the agreement. If it ever had a legal existence, the plaintiff could not rescind it and the defendant has affirmed it.

But it is unnecessary to review the numerous exceptions raised. I place my judgment on the broad ground of want of legal authority in plaintiff's cashier to compromise the claim in question or execute a composition agreement and release therefor. For this reason I am of opinion that the judgment appealed from should be reversed and a new trial ordered, with costs to abide the event.

DALY, Ch. J., and VAN BRUNT, J., concurred.

SUPREME COURT.

THE EXCELSIOR GRAIN BINDER COMPANY, LIMITED, agt. GEORGE H. STAYNER.

Stock — Subscription and payment both necessary to make a complete contract on which action may be maintained.

Where, in an action to recover on subscription to stock, it appeared that the only payment made by the defendant at the time of the subscription was by giving his check for the ten per cent required by statute, payment of which was stopped, and it still remains uncollected in the possession of the company:

Held, that this did not legally amount to a payment of "ten per cent of the par value of the stock subscribed in cash," as required by the statute, and that it gave no interest in the stock and the company could not sustain an action for the cause.

An actual payment is needful to make a complete contract, though not necessarily to be made at the time of the subscription

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ACTION to recover \$5,000 on subscription to stock ; defense, no subscription, for reasons stated in opinion.

B. F. Dunning, Kobbe & Fowler and J. T. Worthington, for plaintiff.

D. M. Porter, for defendant.

BEACH, J. — The only payment made by the defendant at the time of the subscription was by giving his check for the ten per cent required by the statute (*See Laws of 1875, chap. 611, sec. 5*). Payment of the check was stopped, and it still remains uncollected, in the possession of the company. I am unable to conceive how this transaction can legally amount to a payment of "ten per cent of the par value of the stock subscribed, in cash;" there has no money been realized, and none came to the treasury of the company.

In *Jenkins agt. President, &c., of the Union Turnpike Road* (1 *Caine's Cases in Error*), the mere subscription, where a part of the amount of each share is ordered to be paid at that time, and none is paid, gives no interest in the stock, and the company cannot sustain an action for the cause. The court says: "The commissioners were directed to exact from the persons who were to be admitted members of the corporation both subscription and payment as a condition precedent to their admission. If they omitted either to subscribe or to pay, they did not come within the terms of admission. If so, the bare act of subscription was wholly nugatory."

The same principle is adjudicated in *The President, &c., Highland Turnpike Company agt. McKean* (11 *Johnson*, 98).

It is not needful that the payment should be made at the time of subscribing (*Black River and Utica R. R. Co. agt. Clarke*, 25 *N. Y.*, 208; *Ogdensburgh, &c., R. R. Co. agt. Wooley*, 3 *Abbott's Court of Appeals Decisions*, 398; *S. C.*, 1 *Keyes*, 118; *Beach agt. Smith*, 30 *N. Y.*, 116).

From these authorities may be deduced that a payment of

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the ten per cent at the same time is not needful to render the contract complete.

In *Black River and Utica Railroad Company agt. Clarke (supra)*, the section of the act required the payment of ten per cent by each subscriber, upon the amount subscribed by him, at the time of subscribing. I see no material difference between the enactment and the one governing the case at bar. The court says: "The intent of this section, doubtless, was that no subscription should be valid until ten per cent was paid thereon. The subscription and the payment of ten per cent must both concur to make a valid subscription." In the *Ogdensburgh, &c., Railroad Company agt. Wooley (supra)*, notes, including the ten per cent, were given by the defendant; after the subscription they were discounted at a bank by the company, and collected of the defendant by the bank. The fact of the per centage having actually been paid by the defendant, passed into the treasury of the company, sustained the judgment. The court say, in referring to their decision here cited: "The cases, in effect, decide that there must be both a subscription and payment of money to make a binding contract, but that these acts need not be simultaneous, the statute being satisfied by a subsequent actual payment or receipt of the money. Again, if the directors did not exact the money, and the subscriber omits to pay at the time of the subscription, it is the doctrine of former cases in this court that the contract remains incomplete, and of no binding force. If, however, the money be subsequently paid, the statute is complied with." I conclude from these adjudications that an actual payment is needful to make a complete contract, though not necessarily to be made at the time of the subscription.

The learned judge in the above case did express an opinion that the statute provisions might be regarded as intended for the benefit of the company, and therefore capable of being waived by them at the request of the subscriber. But it is significant that a majority of the court did not concur in that view, and the text of that portion of the opinion is omitted.

Douglas agt. Haberstro.

I have not considered the question whether or not the plaintiff can maintain an action upon the defendant's check, nor what effect the collection of the check would have on an action subsequently brought to recover the stock subscription.

A judgment dismissing the complaint, with costs, is directed.

' SUPREME COURT.

ALICE DOUGLAS agt. JOSEPH L. HABERSTRO, as sheriff of the county of Erie.

Appearance — what is sufficient — Effect of signing "att. for deft." — Practice — Code of Civil Procedure, sections 421, 422.

The act of an attorney in subscribing himself as attorney for defendant to notice of motion, while probably sufficient to constitute an appearance for the purpose of waiving mere irregularities, is insufficient to entitle the attorney to notice of other and entirely different proceedings in the action.

To require the service of notice of such proceedings, where no demurrer or answer has been served, a formal notice of appearance has been rendered necessary by the provisions of the Code of Civil Procedure, sections 421, 422.

Erie Special Term, November, 1879.

MOTION to set aside judgment for irregularity, on the ground that defendant had no notice of the application therefor.

John Campbell Hubbell, plaintiff's attorney, opposed.

Adelbert Moot, of counsel for defendant, in favor of.

DANIELS, J. — The act of subscribing himself as attorney for the defendant, to the notice of motion, served for the exoneration of the sheriff, from liability as bail, was probably

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sufficient to constitute an appearance, for the purpose of waiving mere irregularities (*Baxter* agt. *Arnold*, 9 *How.*, 445; *Kelsey* agt. *Davis*, 15 *id.*, 92; *Ayers* agt. *Western Ins. Co.*, 48 *Barb.*, 132). But while it may very well have been attended with that result, it was still insufficient to entitle the attorney to notice of other and entirely different proceedings in the action. To require the service of notice of such proceedings, when no demurrer or answer has been served, a formal notice of appearance has been rendered necessary by the provisions of the Code of Civil Procedure (*id.*, *secs.* 421, 422), and it is quite evident from the affidavits produced on this motion, that no such notice was served on the plaintiff's attorney at any time. The consequence of that omission is, that the application for judgment, the reference ordered and executed under it, and the judgment afterwards entered upon the report of a referee, were irregular. But, as the defendant swears to merits and excuses his default, he should be let in to defend. The judgment, order and report, must, for that reason alone, be set aside, and the defendant allowed to answer within ten days, on payment of ten dollars costs of opposing the motion, and the expenses attending the proceedings set aside.

NOTE. — Under the old supreme court rules, which are abrogated by section 431, Code of Civil Procedure, signing "*atty. for deft.*," was an appearance entitling to notice. The new Code has changed the practice. [Ed.]

Ruckman agt. Ruckman.

NEW YORK SUPREME COURT.

MARGARET RUCKMAN agt. ELISHA RUCKMAN.

Divorce a mensa et thoro — what necessary to be shown to entitle a wife to a decree for alleged cruelty and abandonment.

To entitle a wife to a divorce *a mensa et thoro*, under the first and second subdivisions of the statute (3 R. S., 147, sec. 51), there must either be actual violence or a reasonable apprehension of bodily injury.

Wounded susceptibilities will not suffice ; occasional outbursts of passion will not do ; nor mere abuse, however gross.

Words of menace, however, are sufficient, if they be of such a character, and accompanied by such circumstances, as to justify a belief in their seriousness. That is, they must impress the person to whom they are addressed, not as idle words, not as a form of intemperate expression, but as importing action, and in that sense conveying the reality of a threat of bodily harm.

Jeopardy to health also comes within the rule.

Although words in form threatening were uttered, yet where, upon a patient and thoughtful review of the entire evidence, the court are satisfied that the language used was a mere exhibition of coarse and vulgar passion, that the defendant never for a moment contemplated physical violence, and that the plaintiff never believed herself to be in the slightest jeopardy :

Held, that the action should be dismissed.

To justify a judgment for limited divorce on the ground of abandonment, such circumstances must appear as manifest *a settled and determined purpose in the husband to withdraw from the wife permanently his society and protection, and to withhold from her the means necessary for her support.*

A decree for maintenance is but an incident to one for a separation, and the circumstances under which such a decree (i. e., for maintenance) may be made, must be of such a nature as would in themselves justify a direction of a separation.

Special Term, January, 1880.

ACTION for separation from bed and board, for alleged cruelty and abandonment.

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Jacob F. Miller (with him *Mr. Jacob Weart* of the New Jersey bar), for plaintiff.

C. P. Hoffman, of Nyack (with him *Mr. R. Allen, Jr.*, of the New Jersey bar), for defendant.

BARRETT, J.—The law applicable to this class of cases is reasonably well settled. To entitle a wife to a divorce *a mensa et thoro* under the first and second subdivisions of the statute (2 R. S., 147, sec. 51), there must either be actual violence or a reasonable apprehension of bodily injury. Wounded susceptibilities do not suffice for so grave and momentous a judgment as we are called upon to pronounce. Occasional outbursts of passion will not do; nor mere abuse, however gross. Words of menace, however, are sufficient if they be of such a character and accompanied by such circumstances as to justify a belief in their seriousness. That is, they must impress the person to whom they are addressed, not as idle words, not as a form of intemperate expression, but as importing action, and in that sense conveying the reality of a threat of bodily harm. The authorities in support of the rule, as thus summed up, are so numerous that it will only be necessary to cite a few of the more prominent cases in our own State (*Perry* agt. *Perry*, 2 *Paige*, 501; *Burr* agt. *Burr*, 10 *id.*, 31, 32, 33; *Mason* agt. *Mason*, 1 *Edw. Ch.*, 278; *Whispell* agt. *Whispell*, 4 *Barb.*, 217; *Davies* agt. *Davies*, 55 *Barb.*, 133; *Davis* agt. *Davis*, 1 *Hun*, 444; *Kennedy* agt. *Kennedy*, 73 *N. Y.*, 369).

Jeopardy to health also comes within the rule. This, however, need only be mentioned in passing, because, although there was a suggestion on that head during the trial, the evidence wholly fails to show any special or marked physical change in the plaintiff, or the likelihood of any.

Upon the main question, we are of opinion that the present plaintiff entirely fails to make out a case within the rules which have been stated. Words in form threatening were

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certainly uttered. But upon a patient and thoughtful review of the entire evidence, we are fully satisfied that the language used was a mere exhibition of coarse and vulgar passion; that the defendant never for a moment contemplated physical violence, and we feel bound to add, that the plaintiff never believed herself to be in the slightest jeopardy. Without attempting the painful and really unprofitable task of stating and analyzing the testimony in detail, it will suffice to point out certain prominent and substantially undisputed features of the case which lead us to this conclusion.

The parties, though unrefined and illiterate, seem to be very decent and worthy sort of people. They managed to get along with rather more than average felicity (we had almost said, in view of the prevalence of divorce cases in our courts, with rather less than average infelicity) until Mr. Ruckman became possessed of what, from the entire absence of legal evidence, must be called an unhappy delusion as to his wife's infidelity. At this point, it is to be observed that the defendant was not generally violent. Indeed, all the witnesses agree that he was a man of kind heart, charitable disposition and generous impulses. No one who needed help was ever turned empty-handed from his door. He was gentle and considerate to his domestics. His wife had every thing that she desired; a comfortable home, horses, carriage, jewelry, and clothing fully adequate to her position. She, too, seems to have been highly respected; a good friend, a pleasant neighbor and an excellent wife. Such facts as these are properly to be considered (*Barrere* agt. *Barrere*, 4 *John. Chy.*, 189).

There were two distinct epochs of passion; one before Mrs. Ruckman went to her father's; the other after her return home. The former is made up of more numerous incidents than the latter. Indeed, that which immediately preceded the final separation was but an isolated outburst. Even the first, however, was not continuous. These sallies of passion were fitful and occasional. They were not put forward in

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bad faith for ulterior purposes, but were unfortunately the result of deep, though mistaken, conviction. If Mr. Ruckman, after the first exhibition of feeling, had found his wife in Haring's company, he might possibly have been unable to control himself. But Mrs. Ruckman was too good a woman to associate with a person who, even without cause, had become thus objectionable to her husband, and so long as she conducted herself in that creditable manner, she had nothing to fear. It cannot be overlooked, that the defendant, even in his worst moments, never raised a finger against her. Under such circumstances, and in view of such personal characteristics, it is impossible to believe that the occasional expressions, in the form of threats, which we find mixed in as it were with the abusive epithets, had any independent vitality as words of menace. They were simply part and parcel of the defendant's wild and chaotic speech. That the plaintiff so believed, is entirely clear from her own actions. She always slept with the defendant, never sought a separate bed-room, never shut or locked herself in anywhere, and never asked any assistance, or intimated that she might need it. Then her letters, written between the two periods, are quite conclusive. In these she speaks to the defendant most affectionately, constantly requesting him to come and see her, declaring that "no matter what people say to her, *she knows how good he has been,*" blessing him, and by many other expressions indicating the fallacy of her present theory that she believed him capable of the brutality contemplated by the law. The effect of these letters cannot be removed by saying that they were written as a matter of Christian duty. To win a man back by hypocrisy and falsehood is a strange view of Christian duty. But the letters, on their face, seem to protest against the character thus assigned to them. They are clearly the spontaneous and heartfelt utterances of a true and loyal woman, eager to resume her matrimonial relations, and in whose breast lurked no sense of past, present, or prospective danger.

When she returned to her home, months elapsed without a

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single recurrence of trouble. During this period of repose Haring died, and with him all cause of unhappiness seemed to have been buried. But at length there was an acrimonious scene upon another subject, and then, by way of recrimination, the old suspicion was revived and flung at the plaintiff in a most improper and indecent manner. But it is absurd to talk of violence, or apprehension of violence, in this connection. If nothing of the kind was contemplated or apprehended during Haring's lifetime, how exceedingly remote was such a contingency months after his death. And, further, when we reflect, that from that time until her departure, some ten days later, Mrs. Ruckman slept securely, if not peacefully, by Mr. Ruckman's side every night; that nothing further occurred to disturb their tranquility; that she sought legal advice in the *interim*, and finally left her home in the company, with the assistance, and under the protection of her husband, the conclusion is irresistible.

She may have left solely because unwilling to put up with further indignity, or she may have been advised that the assertion of her womanhood need not jeopardize her pecuniary and property interests. What may be confidently asserted, however, is that she *did not* leave because of apprehended violence.

The charge of abandonment is equally untenable. It was the lady who voluntarily left her husband's home. That home has always been open to her. Mr. Ruckman begged her to remain, has since entreated her to return, has urged others to do likewise, *has legally bound himself, for her support* (a fact which, of itself, seems to be conclusive [2 R. S., page 147, sec. 51, sub. 3]), and has furnished her with \$100 in money.

No demand for further means was ever made upon him. Instead of that, came the present suit and other harassing litigations, seeking the recovery of considerable property.

We are satisfied that the defendant's efforts to induce the plaintiff to remain, and subsequently to bring her back, were

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made in good faith; not for the purpose of avoiding a separate maintenance, nor to elude the justice of the courts. He had, it is true, declared in his passion that she must leave. But he no more intended that, and she no more believed that he did, than he intended or she apprehended physical injury.

This branch of the case is not nearly as strong as *Barlow* agt. *Barlow* (2 *Abb. [N. S.]*, 259), where it was held that the actual expulsion of the wife on an accusation of unfaithfulness, was not, under the circumstances, sufficient to sustain the charge of abandonment. "Regarding the marriage contract as stable and sacred," says the court in that case, "our law does not favor separations between husband and wife, and to justify a judgment for limited divorce on the ground of abandonment, such circumstance must appear as manifest a settled and determined purpose in the husband to withdraw from the wife permanently his society and protection, and to withhold from her the means necessary for her support" (See, also, *Atwater* agt. *Atwater*, 53 *Barb.*, 621, and *Ahrenfelds* agt. *Ahrenfelds*, 1 *Hoffm. Chy.*, 47).

As to the claim for a separate maintenance, independent of a decree of separation, it is only necessary to refer to *Douglas* agt. *Douglas* (5 *Hun*, 140). It was there distinctly held by the general term in this department (citing *P.* agt. *P.*, 24 *How. Pr.*, 197; *Davis* agt. *Davis*, and *Atwater* agt. *Atwater*, *ubi supra*), that a decree for maintenance is but an incident to one for a separation, and that the circumstances under which such a decree (*i. e.*, for maintenance) may be made must be of such a nature as would, in themselves, justify a direction of a separation. The reasons for this construction of the statute (2 *R. S.*, 147, sec. 58) are fully assigned, and need not be here restated.

It follows that the defendant is entitled to judgment, dismissing the complaint upon the merits.

Dougherty agt. Gardner.

SUPREME COURT.

PATRICK H. DOUGHERTY agt. EDWARD A. GARDNER.

Execution against the person — assignment of part of judgment for tort.

When part of a judgment for a tort is assigned, execution against the person may still issue in the name of the assignor for the full amount of the judgment.

A judgment for damages resulting from personal injuries is assignable in whole or in part. The right to imprison is not lost.

Special Term, January, 1880.

MOTION by defendant to vacate and set aside execution against his person.

Patrick H. Dougherty sued Edward A. Gardner for damages resulting from an assault and battery, and after arresting and holding the defendant to bail on *mesne* process, recovered judgment by default for \$5,130.20. While an execution against property was in the hands of the sheriff, the plaintiff assigned one-third of the judgment, a copy of which assignment was forthwith served on the defendant. After the return of the execution against the property, plaintiff's attorney, without any reference to the assignment, issued an execution against the person in the usual form, in the name of the people, for the full amount of the judgment under which execution the defendant was arrested and imprisoned. On affidavits setting forth the above facts, and claiming that he owed the plaintiff only two-thirds of the judgment and his assignee the other third, defendant moved to set aside the execution and for his discharge from imprisonment thereunder.

Robert Johnstone, for defendant, insisted: The execution should have been issued only for the two-thirds owned by the plaintiff, and that as to the other third the right to issue an

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execution against the person was lost, being destroyed by the assignment. That the judgment in the hands of an assignee was a mere debt for which the defendant could not be imprisoned, no wrong having been done the assignee. That if the plaintiff could assign a part to one, he could split the judgment into fifty parts and compel the defendant to travel all around in order to settle a compromise, and that if each could detain the defendant for his share, it was a logical conclusion that each might have a separate execution. That the policy of the law was in favor of compromises and condonements of such torts. That it would be unjust to compel an atonement after arrest to a person that had never been injured, and let a person that was injured assign away a right of forgiveness. Personal injuries cannot be assigned before judgment. Can they be afterwards, except as mere debts? If not, the arrest is illegal.

Peckham & Tyler, for plaintiff. The plaintiff was a mere trustee for the assignee as to the part assigned, and the judgment being a writ, the process must conform to it and issue for the full amount due. If the assignment of a part of the judgment was valid, it carried with it the right to imprison, and if invalid, then the defendant was not prejudiced by it. The assignment vitiates no remedy.

LAWRENCE, J.—Motion denied.

Dusenbury agt. Kielly.

N. Y. COMMON PLEAS.

CHARLES DUSENBURY, appellant, agt. WILLIAM S. KIELLY,
as receiver and respondent.

False imprisonment — when action for will lie — Statute of limitations — when begins to run in action for false imprisonment, and when action barred.

An action for false imprisonment will lie for, and immediately upon, an illegal arrest.

Consequently, the statute of limitations begins to run from the time of such illegal arrest, and the cause of action therefor is barred at the end of two years from such arrest, although the proceedings in which the arrest took place are continued within the two years.

First Department, General Term, January, 1880.

On the 14th of November, 1876, upon the application of the defendant, Mr. justice SPEIR, of the superior court, issued a warrant under what is commonly called "The Stillwell act," for the arrest of the plaintiff, and on the 15th of November the sheriff arrested the plaintiff, and produced him in court.

The counsel for the plaintiff objected to the regularity of the proceedings, the jurisdiction of the judge, and the sufficiency of all papers, and also gave the recognizance and bond as required by said act; and such proceedings were thereupon had, that in February, 1877, an order was made by said judge vacating and setting aside said warrant, and exonerating the bail from liability.

Thereupon the cause was, upon application of the defendant, removed by *certiorari* to the general term of the supreme court, which court, on the 15th day of October, 1877, reversed the said order of judge SPEIR, and remitted the matters to said judge to be further proceeded with.

On the 7th day of January, 1878, Mr. justice SPEIR made an order making the order of the general term of the

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supreme court the order of the superior court, and directing the plaintiff to appear under the said original warrant and requiring his bail then and there to produce him.

As requested by said last mentioned order, the plaintiff voluntarily appeared, and such proceedings were thereupon had that an order of commitment was issued by Mr. justice SPEIR against the plaintiff.

Whereupon the plaintiff removed the proceedings by *certiorari* to the general term of the supreme court, who affirmed the last mentioned order of Mr. justice SPEIR.

The plaintiff then appealed to the court of appeals, and the court of appeals ordered and adjudged that the order of the general term of the supreme court and the warrants of Mr. justice SPEIR and all proceedings had thereunder be vacated and set aside, upon the ground and for the reason that said justice never had any jurisdiction in the matter.

The judgment of the court of appeals was made the judgment of the supreme court, May the 28th, 1879, and the warrant and all subsequent proceedings thereunder vacated and set aside.

This action to recover damages for false imprisonment was commenced July the 7th, 1879.

The court below held that the statute of limitations ran against the claim, more than two years having elapsed since the first arrest. From this judgment plaintiff appeals.

Hall & Blandy, of counsel for appellant.

D. M. Porter, of counsel for respondent.

VAN BRUNT, J.—When we consider the distinction between an action for false imprisonment and one for malicious prosecution, all difficulties in the solution of the question presented by this appeal seem to be removed.

An action for false imprisonment will lie where there is an imprisonment without any process, wholly illegal, without

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regard to the question whether any crime has been committed or debt due.

An action for malicious prosecution will lie where there has been an arrest made at the instance of a prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process, and proceedings which the facts did not warrant, as appears by the result.

The words "as appears by the result," make the essential difference between actions for false imprisonment and those of malicious prosecution.

An action for malicious prosecution will not lie until there has been a determination in the proceedings in which the arrest was made that the facts did not warrant the arrest.

An action for false imprisonment accrues the instant the imprisonment takes place, and becomes complete the moment the imprisonment ceases. In the one case, jurisdiction was had of the subject-matter and the person by the officer issuing the warrant; in the other, the officer never had jurisdiction to issue the process if the warrant was under process.

The plaintiff in this action, claiming that his arrest was under a process wholly illegal, brought this action, as his counsel claims, for false imprisonment.

There was no imprisonment of the plaintiff after he was released upon the giving of bail.

His subsequent appearance was wholly voluntary. The defendant imposed no restraint whatever upon him. His bail could not have been held liable if he had failed to appear (*Brodhead agt. O'Connell*, 3 *Barb.*, 175), because the judge issuing the warrant had never acquired jurisdiction, and this defense could have been set up in an action upon the bond and would have prevented any recovery. Therefore his only cause of action rested upon the imprisonment at the time of the execution of the original warrant.

The judge issuing that warrant having never acquired any jurisdiction in the matter, it was never any protection to the party at whose instance it issued.

Guth agt. Dalton.

If the facts proved had shown a cause of action for malicious prosecution, then an entirely different rule would have prevailed. No cause of action would have arisen until it had been finally determined that the facts did not warrant the arrest.

I am of the opinion, therefore, that the statute of limitations was a defense to this action, and that the judgment appealed from should be affirmed.

N. Y. COMMON PLEAS.

GUTH agt. DALTON.

Stenographer's fees — What fees official stenographers of courts are entitled to charge to counsel for an official copy of minutes of trial — Code of Civil Procedure, sections 86, 289.

The fee allowed by law to official stenographers of the court for furnishing a copy of the stenographer's minutes of a trial to counsel is *ten cents per folio* (Following Wright agt. Nostrand, post 184).

It seems that, under section 86, the stenographer may require payment of his fees in advance (This is adverse to Wright agt. Nostrand, post 184).

Special Term, February, 1880.

MOTION to compel official stenographer of court to furnish copy of minutes at the rate of ten cents per folio.

J. F. DALY, J. — No rate for copies of the stenographer's notes is fixed except for copies ordered by the judge for his own use, and the rate of ten cents a folio is established for such copies (*Code, sec. 289*).

The statute requiring the stenographers to furnish a copy of their notes to each party in the cause, provides that they must do so upon payment "of the fees allowed by law" (*Code, sec. 86*). It is a reasonable construction of the two sections to

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consider the rate of ten cents a folio as the fee allowed by law. There is no reason why a different rate should be fixed for copies of the testimony furnished for the use of parties and copies for the use of the judges. The labor is identical, and if ten cents be the rate fixed by law in the one case it should be deemed a fixed rate for all cases, since the legislature has unequivocally (*in sec. 289*) expressed the intention of establishing a legal fee for the service.

This view has been taken by the superior court (SPIER, J., *Wright agt. Nostrand*, 58 *How.*, 184) and should be followed.

Under section 86 it seems, however, that the stenographer may require payment of his fees in advance, and I think it not unreasonable to require it.

Motion granted, on tender of fees, at the rate of ten cents a folio.

SUPREME COURT.

In the Matter of CHARLES HAMILTON and JOHN M. DEANE.

Certiorari — not allowable before final order is made — What is a final order under the statute (Laws of 1879, chapter 807) "to provide for the summary investigation of unlawful or corrupt expenditures by officers of towns," &c.

A writ of *certiorari* should not be allowed before a final order is made.

The defendants are railroad commissioners of the town of Cobleskill, in the county of Schoharie, and proceedings were taken against them under chapter 807 of the Laws of 1879, entitled "An act to provide for the summary investigation of unlawful or corrupt expenditures by officers of towns or incorporated villages, and for restraining the same." Objection was made to such proceeding on the ground that they were not town officers, and, therefore, not amenable to the provisions of said act. This objection was overruled and they were directed to account.

Held, that the order directing the investigation to proceed was not a final order. The final order to be made is one "restraining and prohibiting such unlawful or corrupt expenditure, appropriation, squandering or waste of such moneys" (these which came into their hands as officers

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of the town) "under penalty, for disobedience, of fine or imprisonment, or both, in the discretion of the court."

The final order must be that which ends the proceeding, and cannot be any of these, which must be made during progress.

Ulster Special Term, December, 1879.

MOTION to quash a writ of *certiorari*.

Henry Smith, for motion.

R. W. Peckham, opposed.

WESTBROOK, J. — Hamilton and Deane are railroad commissioners of the town of Cobleskill, in the county of Schoharie. Proceedings were taken against them under chapter 307 of the Laws of 1879, before WILLIAM L. LEARNED, one of the justices of this court. Objection was made to such proceeding on the ground that they were not town officers, and, therefore, not amenable to the provisions of said chapter 307 of the laws aforesaid. This objection was overruled, and the parties were directed to account. At this point a writ of *certiorari*, removing the proceedings into this court, was allowed, *ex parte*, by the judge writing this opinion, which writ the present motion seeks to quash.

The point which is made by the moving parties is, that the writ should not be allowed before a final order is made, and that such final order had not been granted when such writ was allowed. The counsel for Messrs. Hamilton and Deane, conceding the law to be that a *certiorari* will only be allowed upon a final order, nevertheless, claim that a final order has been made. The question which the motion presents is, was the order directing the investigation to proceed a final order?

A reference to the statute, which is entitled "An act to provide for the summary investigation of unlawful or corrupt expenditures by officers of towns or incorporated villages, and for restraining the same," will show that the final order

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to be made is one "restraining and prohibiting such unlawful or corrupt expenditure, appropriation, squandering or waste of such moneys" (these which came into their hands as officers of the town), "under penalty for disobedience of fine, or imprisonment, or both, in the discretion of the court." The final order must be that which ends the proceeding, and cannot be any of these which must be made during progress. It has, however, been ingeniously argued that the order directing the account is the final one, and that the one to be made, after the investigation has been had, is in the nature of a proceeding after final judgment, and hence that a review and reversal would be like the review of a judgment after sentence has been executed. This argument, it seems to me, is unsound. The object of the statute was to enable a justice of the supreme court, in a summary manner, to restrain certain public officers from misappropriating moneys in their hands, which belong to the municipality of which they are officers. The proceeding is a single one. Upon proper application the investigation must proceed, and the order founded upon the investigation, as it *ends* the proceeding, must be the *final* one, *i. e.*, the last and closing one to be made therein.

Neither, as was also urged, does this conclusion work any injustice to the parties who obtained the *certiorari*. If they are willing to be restrained, pending the prosecution of the writ, from receiving any more moneys belonging to the town, and from disposing of any money or property belonging to it, a restraining of doubtful validity, they ought not to be unwilling to submit to an investigation of their accounts, the only result of which can be an order restraining them from doing some act which they ought not to do.

Motion to quash granted, the costs of motion to abide the event of the investigation, and to be awarded by the judge before whom the same is pending.

Brown agt. Cleveland.

SUPREME COURT.

ARTHUR C. BROWN, as executor and trustee of the last will and testament of AUGUSTUS CLEVELAND, deceased, agt. MARIA E. CLEVELAND and others.

Will as effected by codicil thereto — Repugnancy — Construction.

Where a testator, after giving legacies to certain persons named in his will, to the amount of \$58,000, directed the rest and remainder of his estate to be invested by his executors so as to yield income, which income he gave to his wife for life, and by a final codicil, after specifically making some new provisions in favor of his wife, directed that the sum of \$60,000 should be set apart from his estate and should be invested by his executors for the benefit of his wife, the testator, however, declaring, in and by the final codicil, that the provisions therein made for his wife were in addition to the provisions he had made in his will and previous "codicils" for her; and that his will and codicil, except as changed by the last codicil, were confirmed:

Held, that the legacies, to the amount of \$58,000, given to others were not disturbed by the new provisions created in favor of his wife by the last codicil; and that the principal sum of \$60,000 therein directed to be invested by his executors for the benefit of his wife must be raised from the *rest and remainder of the estate*, after the satisfaction of the legacies, although the income of this rest and remainder had been given to her by the will.

Where there is a real repugnancy between the will and a codicil thereto, then the disposition made by the latter must prevail as the latest expression of the testator. But there is no hostility between the codicil and will under consideration which prevents the construction above indicated, by which effect is given to the provisions of both will and codicil.

Where a testator, by a final codicil to his will, speaks of "a codicil or codicils" to his will theretofore executed, and the expression "codicils" is repeated in other parts of the same instrument, but no codicil is produced, other than the one last executed, and another one executed some years before, and no evidence being adduced of the fact of any other codicil having been executed:

Held, that it must be accepted as a fact that there were no other codicils except the two produced.

Special Term, January, 1879.

Brown agt. Cleveland.

AUGUSTUS CLEVELAND, the testator, died in the city of Paris, in France, on the 8th day of March, 1878.

On the 11th day of November, 1856, he made a last will and testament by which he disposed of his estate real and personal.

By his will, after bequeathing in legacies in favor of his brother, sisters, the widow of a deceased brother, nephews and others, the sum of \$53,000, he gave the rest, residue and remainder of his estate to his executors, in trust, to invest the same in the manner directed in the will, to collect the revenue and profits thereof and to apply the same to the use of his widow during her life. On her death the trust was to cease and the estate was given to any child or children of the testator, and in the event of his death without leaving issue him surviving, then the estate was given to the children of his sister, Mary C. Brown, and of his brothers George and Henry Cleveland. The provisions in favor of his wife were made and were to be accepted in lieu of dower.

On the 15th day of August, 1860, the testator made a codicil to his will, in and by which he reduced the amount of the legacies given in his will to certain persons and made a change in his executors; but in all other respects he confirmed his will.

On the 2d day of April, 1872, the testator, at the city of Nice, in the republic of France, made a further codicil to his will, in which he makes other changes in respect to the executors thereof. When this codicil was made the will was not before the testator, but the same, with the prior codicil thereto, was in the charge of the agent of the testator in the city of New York. In and by this last codicil the testator appointed his wife an executrix of his will, "and of the several codicils thereto," and declared that "in all other respects (except as hereinafter changed) I hereby confirm my said will and codicil (or codicils)."

The testator by this codicil declared as follows:

"Second. In addition to the provisions I have made in my

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said will and codicils for my said wife, Maria E. Cleveland, and in addition to what she would by law receive under said will and codicils, I give and devise to her the income of sixty thousand dollars, from the time of my death, for and during her natural life. And I hereby authorize and direct my executors and executrix, for the purpose of raising said income, to set aside from my estate the said sum of sixty thousand dollars, and to invest the same on good bond and mortgage, or in bonds of the United States government, paying to her the interest or income of said sixty thousand dollars from my death, as aforesaid, in semi-annual payments. And in case my personal estate is not sufficient to yield said sixty thousand dollars, in addition to the other legacies and provisions of my said will and codicils, then, in that event, I hereby authorize, empower and direct my said executors and executrix, or the survivor or survivors of them, to sell my lot and store, number ninety-nine Maiden lane, in the city of New York," &c., &c. "And I hereby make said legacy a charge on all my real estate."

At the death of his wife the testator, by this codicil, gave the sum of \$60,000 to certain charitable institutions named by him and then provides that "in case any of the above-named legacies are not legally payable by reason of the institutions or societies not being named or described with sufficient accuracy or otherwise, then I authorize and direct my executors to pay such legacy or legacies to such charitable institutions or societies as my said wife, Maria E. Cleveland, shall in and by her last will and testament appoint and direct, and I hereby authorize and empower her to make such appointment and direction. The testator then gave and bequeathed to his wife "in addition to the other provisions" he had made for her "in said will and codicil" all the paintings, marbles and other works of art which he had purchased in Europe, also all his silver, linen, paintings and other articles of *vertu* at Carmansville, New York, including china and porcelain, and directed that "in no event shall any portion of these

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articles be sold to pay any of the legacies or expenses of my estate." He also declares that "the provisions made for my wife in this codicil to my will are in consideration of her great faithfulness and devotion to me in my long and painful illness."

At his death the testator left him surviving his widow, Maria E. Cleveland, but no child or children.

William A. Beach, for plaintiff.

Lott C. Clark, for widow.

A. P. Cupwell and *Hamilton Odell*, for Charles A. Cleveland and George D. Cleveland and others.

Wheeler H. Peckham, for St. Luke's Hospital.

William Tracy, for Half Orphan Asylum.

Jno. L. Sutherland and *Stephen P. Nash*, for other societies.

VAN VORST, *J.*—In the first clause of the last codicil to his will, bearing date the 2d day of April, 1872, the testator speaks of a "codicil" (or codicils) to his will, theretofore executed. This expression "codicils" is repeated in other parts of this instrument in connection with other subjects, and notably with regard to provisions made by the testator in favor of his wife. But no codicil, other than the one bearing date the 15th day of August, 1860, and the one first above-mentioned, has been produced before the surrogate for probate; and no evidence has been adduced before me of the fact of any codicil having been executed by the testator, other than the two above mentioned. The fact that the testator had resided many years abroad, and that his will, with the first codicil, remained in New York with the custodians selected by him for safe-keeping, may have led him, in the

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absence of the document, to speak of other codicils, it not being absolutely clear to his mind whether his testamentary dispositions, in addition to his will, were contained in one or more codicils, and hence, for greater caution, in alluding to the subject in his last codicil, he speaks in the alternative of a "codicil," and in brackets "[or codicils]." Whether there was one or more, he intended to confirm whatever testamentary disposition he had in that manner made, except as changed by his last codicil. In the absence of any proof upon the subject, we must accept the conclusion that there was not, in fact, any codicil executed by the testator, other than the two produced in evidence on the trial.

By the will itself, legacies out of his estate, to the amount of \$53,000, were given to relatives and friends of the testator, who are named, and the residue of the estate was devised to the executors, in trust, to be invested in a manner to yield income, which income was given to the wife of the testator for life, and upon her death the principal itself was given to the children of a sister and brother of the testator, in the event that he died without leaving any child or children him surviving.

This was the only provision contained in the will in favor of the testator's wife, and was by her to be accepted in lieu of dower.

By the last codicil the testator placed his wife in a new and distinct relation to his estate. He appointed her executrix of his will. He gave her a power of appointment over a portion of his estate, which he had set apart for charitable purposes, in the event that the beneficiaries selected by him could not take. He gave her, absolutely, certain articles of personal property and works of art and *vertu*, liberated from any possibility of their being appropriated to any other charge or purpose under his will, and made a particular provision for her, during her life, out of a definite portion of his estate, which is to be set aside and properly invested to produce income for that purpose.

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But the testator is careful to declare that the provisions made for his wife, in his last codicil, are in addition to the provisions he had made in his will and codicils for her, and in addition to what she would by law receive under his will and codicils, which was, in substance, what he had antecedently stated that his will and codicils, *except as changed by this last codicil*, were confirmed. Diverse views are entertained by the learned counsel engaged for the respective parties as to the construction of the will, in connection with the last codicil. One contends that the setting apart of the sum of \$60,000 for the benefit of the wife for life, with a remainder over in favor of the charitable societies named in the will, is repugnant to the will by which the whole residue, after the payment of the legacies, to the amount of \$53,000, was given to the trustees, to be by them invested and held for her use during her life, with remainder over to the children of his sister and brothers, and that, as the whole estate was given away by the will, which gifts were confirmed by the codicil itself, the new provision by which the income of \$60,000 is given to her for life and the principal to the charitable societies after her death, and the setting aside of that sum out of his estate for those purposes, is incapable of execution as there is no property remaining undisposed of upon which the codicil in this regard can act.

Another counsel contends that the codicil, in effect, revokes the legacies of \$53,000 given by the will, and that the moneys originally intended to satisfy them is to be appropriated towards the creation of the fund of \$60,000 for the benefit of the testator's wife for life and the charitable societies after her death.

It is urged by the counsel representing these interests that there is such repugnancy between the provisions and gifts in the will and codicil, in these particulars, that one or the other must give way.

Such conclusion cannot be accepted, unless from a con-

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sideration of the will and codicil together the provisions in both are incapable of execution.

Then, the latest disposition made by the testator must prevail, as best in harmony with his intentions (*Parks agt. Parks*, 9 *Paige*, 109).

The effort, however, should be to harmonize and reconcile, if possible, the provisions, apparently repugnant, and in this way effectuate the will of the testator.

In *Taggart agt. Murray* (53 *N. Y.*, 233) it is declared "that effect is to be given, if possible, to all the provisions of the will, and no clause is to be rejected, or interest intended to be given, sacrificed, on the ground of repugnancy, when it is possible to reconcile the provisions supposed to be in conflict." I cannot conclude that the legacies to the amount of \$53,000, given by the will, are disturbed by the codicil.

There is an entire absence of any expression, proceeding from the testator, to indicate that his particular intention, with regard to the persons designated by him to receive gifts to that amount, had been changed; on the other hand the general language of the codicil, by which the will was confirmed, must be held to re-establish these gifts; and, besides, they do not amount to the sum directed to be set aside by the codicil. It is true, as is urged by the learned counsel for the widow, that the testator, in the same manner, confirms the provisions made for his wife in the will, which disposes of the residuary estate for her benefit for life after the satisfaction of these legacies. If the terms "the rest and residue of my estate" are to be regarded as an absolutely fixed and determined property and estate, given by the will to the executors, in trust, not intended to be abridged or disturbed by the codicil, then there would be no property remaining out of which the fund of \$60,000 could be raised. But I do not regard the gift of the residue to his executors, for the benefit of his wife, as inflexible; I think the codicil changes the amount, although not the ultimate direction, of the "rest and residue."

The last codicil was a republication of the will, and makes

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it speak from the date of the codicil, and as changed by its terms; that was clearly the intention of the testator (*Kipp* agt. *Van Cortland*, 7 *Hill*, 346; *Van Alstyne* agt. *Van Alstyne*, 28 *N. Y.*, 375). A consideration of the codicil and will together justifies the conclusion, to my mind, that the testator designed to add to the pecuniary provisions for his wife, and to devote, without prejudice to what he had done for her, a portion of his estate to charitable purposes, and to leave the gifts and legacies to his relatives in the early portion of his will intact.

It has been already seen that the testator, by this codicil, bequeaths to his wife, absolutely, certain personal property. This is a new provision in her favor.

His design, then, was that from the rest and residue of his estate should be set apart this fund of \$60,000, specifically. In this regard he places this fund in the same category with the legacies already given, to be satisfied with them in the first instance out of his personal estate; but he adds "in case my personal estate is not sufficient to yield said \$60,000, in addition to the other legacies and provisions," of his will and codicil "then, in that event," he authorizes and empowers his executors to sell certain real estate to raise this amount of \$60,000, and, in fact, makes the security of this fund a charge upon all his real estate.

As to the rest and residue of the testator's estate, after the payment of the legacies, including the gift of the income of this fund, so to be set aside to his wife, the same is left precisely as it was disposed of by the will and is not disturbed by the codicil. Those entitled to it by the original gift will, in the end, receive it. The setting apart of this sum of \$60,000 in no manner operates to the injury of the widow. It effectuates a particular intention for her advantage. It secures a safe and permanent investment for her benefit for life of this amount, and through it the testator gives effect to his benevolent intentions by devoting the principal sum to charitable objects when, through her death, it can no longer

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be of service to her. The substantial change is in turning into new channels, from what was originally contemplated, the principal of this fund of \$60,000. This construction, I think, is clearly in harmony with the intention of the testator as expressed in the will and codicil.

Points have been submitted on the behalf of the Society for the Relief of Half Orphans, the Nursery and Childs' Hospital, St. Luke's Hospital and other societies. They seek to uphold the provisions of the codicil by which the fund of \$60,000 was set aside by the testator for their ultimate benefit.

The construction given upholds these gifts and assures their fruition.

The gift to the Half Orphan Asylum on Tenth street, in the city of New York, was manifestly intended for "The Society for the Relief of Half Orphan and Destitute Children in the City of New York."

Judgment for the construction of the will and codicils is given in pursuance of the above views, and the form of the judgment to be prepared by the plaintiffs' attorneys will be settled on notice to the attorneys for the other parties.

N. Y. COMMON PLEAS.

JOSE A. OREGON and another agt. JUAN C. DE MIER.

Fiduciary capacity — What must be established in actions to recover money alleged to have been received in a fiduciary capacity — What constitutes a fiduciary relation — what extinguishes the same.

In an action brought to recover money alleged to have been received by defendant in a fiduciary capacity, plaintiff must establish, on the trial, the fiduciary relation, or he cannot recover.

But, on consent of defendant's attorneys, the complaint may be amended at the trial so as to allege a demand arising from a breach of contract, and judgment rendered on such demand.

What constitutes a fiduciary relation.

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Agent's acceptance of his principal's draft, and principal's transfer of such draft, extinguishes fiduciary relation (*See S. C.*, 52 *How.*, 856; 54 *How.*, 890).

Trial Term, January, 1877.

THIS was an action brought to recover \$12,000, in American gold, transmitted by plaintiffs to defendant, with instructions to purchase silver with the amount and to ship the silver to plaintiffs.

On the trial, defendant proved that the order for the purchase and shipment of silver had been countermanded by plaintiffs, who thereupon drew on the defendant, at sixty days' sight, for the amount, to the order of a third party; that defendant accepted the draft, which was duly passed to the third party, and by him discounted. When the draft matured defendant had become insolvent, and the draft went to protest.

Defendant's counsel moved to dismiss the complaint, unless plaintiffs would amend so as to claim on a mere money demand.

Paul Fuller, for defendant.

Hatch & Van Allen, for plaintiffs.

VAN HOESSEN, *J.*—I am of opinion that the pleadings should be changed conformably to the proposition made in open court, at the trial, by the counsel for the defendant.

The complaint should be amended so as to allege a demand for money had and received, or any other demand arising from a breach of contract. I think such an amendment to be absolutely indispensable, for this case does not fall within the relaxed rule established by *Wood agt. Henry* (40 *N. Y.*, 124).

It is barely possible that a recovery upon the present pleading might be sustained, under the decision in *Matthews agt. Cady* (61 *N. Y.*, 651), by regarding the action as founded

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upon an implied *assumpsit* to pay back to the plaintiffs the moneys which the defendant received from them.

As the defendant consents to the alterations of the pleadings the better course is to amend them.

Where a plaintiff brings an action for a cause which is mentioned in subdivision 2, section 179 of the Code, he must prove upon the trial the facts which give him the right to the arrest, unless it appears that the complaint actually sets out a cause of action upon contract, and that the allegations which are inserted for the purpose of establishing a ground for arrest are merely the legal deductions, arguments or inferences drawn by the pleader from the facts constituting the cause of action on contract (*Greentree* agt. *Rosenstock*, 61 *N. Y.*, 589; *Goodrich* agt. *Dunbar*, 17 *Barb.*, 644; *Swift* agt. *Wylie*, 5 *Robt.*, 680).

From the evidence presented at the trial, particularly from the letter dated 7th June, 1875, I am satisfied that the plaintiffs voluntarily put an end to the fiduciary relation between the defendant and themselves. Indeed, I am in doubt whether such a relation ever existed. The parties were old acquaintances, having had dealings together for years and mutual, open and current accounts between them. When the plaintiffs terminated the affair (to use their own language) it was no longer the duty of the defendant to buy fine silver.

The plaintiffs evidently supposed that the defendant had used, or would use, the money, for by drawing at sixty days' sight they gave him sixty days within which to make arrangements for the payment of the money to Vengohechea & Co. They charged him interest on the money, which they would not have done if they had regarded the money as a special deposit of which the defendant could not make any use. These facts are inconsistent with the existence of a fiduciary relation (*Graham* agt. *Dunbar*, 17 *Barb.*, 644; *Siddell* agt. *Paton*, 7 *Hun*, 195).

Besides, the draft was passed to Vengohechea & Co., and by them procured to be discounted. It was paid upon protest

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by De Castro & Co. for the honor of Vengohechea & Co. Whether the plaintiffs would ever be called upon to pay the draft, after it had been accepted by the defendant, depended upon their being charged as drawers. The probabilities are that the plaintiffs received from Vengohechea & Co. full value for the draft before the failure of the defendant and that they were not at all damnified until, on being charged as drawers, they were compelled to take up the draft. If the plaintiffs had not been charged as drawers they would have no claim, whatever, against the defendant. They would have been discharged though the defendant would have been liable upon his acceptance. Whilst there are decisions the other way, I think the true rule is laid down by judge HARRIS in the case of the *Alliance Insurance Company* agt. *Cleveland* (14 *How. Pr.*, 408, 410) and in conformity therewith I decide that the plaintiffs' transfer of the defendant's acceptance changed the character of the defendant's responsibility and that as the transferee of the draft could not have arrested the defendant, the plaintiffs who were charged as drawers could not do so either.

The pleadings should be amended as suggested and the plaintiffs should then have judgment for the amount claimed.

SUPREME COURT.

HENNESSEY agt. HENNESSEY.

Disores — How far parties competent as witnesses — Code of Civil Procedure, section 881.

Under the provisions of Rule 78, a defendant in an action for divorce cannot be permitted to testify in her own behalf, to contradict the plaintiff, in respect to the matters as to which that rule allows the plaintiff to testify.

Although the amendment made to section 881 of the Code of Civil Pro-

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cedure, in 1879, is very broad, *it seems* such amendment has not removed the restriction heretofore imposed by statute, as to parties to an action for a divorce testifying in their own behalf.

LAWRENCE, J. — I am not aware that it has ever been held that, under the provisions of Rule 78, a defendant in an action for divorce can be permitted to testify in her own behalf to contradict the plaintiff, in respect to the matters as to which that rule allows the plaintiff to testify. Nor am I prepared to hold that, under the existing provisions of the Code, either party may testify in their own behalf without restriction. The amendment made to section 831 of the Code of Civil Procedure, in 1879, is very broad, but until it has been determined by an appellate court that such amendment has removed the restriction heretofore imposed by statute, as to parties to an action for divorce testifying in their own behalf, I shall adhere to the former practice and exclude the testimony of the defendant, and only receive that of the plaintiff as to those matters in regard to which the statute and rules permit her to testify. I think that the referee erred, therefore, in receiving the testimony of the defendant. But if I entirely reject the testimony of the defendant, there is still sufficient evidence of condonation by the plaintiff to sustain the report of the referee. Such condonation, by subsequent cohabitation with the defendant, is clearly shown by the evidence adduced by the defendant. Against this evidence there is the uncorroborated statement of the plaintiff himself. The preponderance of the proof is with the defendant on this point, and the report of the referee must, therefore, be confirmed.

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SUPREME COURT.

**WILLIAM H. ROBINSON, respondent, agt. THE NATIONAL BANK
OF NEW BERNE.**

*Attachments against national banks or their property — Jurisdiction of state
courts — Code of Civil Procedure, sections 636, 707.*

The last clause of section 5242, United States Revised Statutes, forbidding an attachment, injunction or execution to be issued against a national bank before final judgment in any proceeding in a state court, applies only to such banks as have committed or are contemplating an act of insolvency.

An attachment can, therefore, issue against a national bank, except under the above circumstances, from a state court, as provided by the Code of Civil Procedure.

Fourth Department, General Term, January, 1880.

APPEAL from an order of the Herkimer special term denying the defendant's motion to set aside a warrant of attachment.

The defendant is a national bank, incorporated and organized under title 62 of the Revised Statutes of the United States, and is located in New Berne, North Carolina.

The plaintiff is a stockholder in the bank, and entitled to recover certain unpaid dividends. The defendant is a solvent corporation, and has no place of business, or agent within this state.

The stock claimed by plaintiff has been sold by the defendant by proceedings in the state of North Carolina against one John Satterlee, and for a merely nominal sum.

For further facts see opinion.

A. R. Dyett and R. W. Townsend, for appellant, argued that this court has no jurisdiction to issue this attachment, and cited *Farmers' &c., Bank agt. Deering* (19 U. S., 29), *The Chesapeake National Bank agt. First National Bank of*

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Baltimore (40 *Maryland*, 269), *Thompson's National Bank Cases*, pages, 117, 503). In *Southwick agt. First National Bank of Memphis* (7 *Hun*, 96) the general term in the first department held that this court could issue an attachment against a non-resident national bank. But in that case the question arose under section 57 of the national banking act of 1864, as amended by act of March 3, 1873 (*U. S. Statute at Large*, vol. 17, chap. 269, sec. 2). Subsequently to this case of *Southwick agt. First National Bank of Memphis*, in *Central National Bank agt. Richland National Bank* (52 *How. P. R.*, 136), justice BARRETT, at special term in New York, held, that under section 5242 as now existing, no attachment could be issued against a national bank, and that the case of *Southwick agt. First National Bank of Memphis* is no longer applicable by reason of the amendment. This decision of Mr. justice BARRETT is approved and the same doctrine announced in *Rhoner agt. First National Bank of Pennsylvania* (14 *Hun*, 126) by the same general term which decided *Southwick agt. First National Bank of Memphis*. The power of congress to protect national banks from attachments and other process before judgment is unquestionable (*Farmers', &c., Bank agt. Deering*, 19 *U. S.*, 29; *Central National Bank agt. Richland National Bank*, 52 *How. P. R.*, 136, 137; *Crocker agt. Marine National Bank*, 101 *Mass.*, 240, 242; *Chesapeake Bank agt. First National Bank of Baltimore*, 40 *Maryland*, 269; *Cadle agt. Tracy*, 11 *Blatchf.*, 102; *Osborn agt. Bank U. S.*, 9 *Wheaton*, 783; *Martin agt. Hunter's Lessee*, 1 *Wheaton*, 304, 336, 337; *The Moses Taylor*, 4 *Wallace*, 411, 429).

T. C. Cronin, for respondent. The defendant, as a corporation, is liable to attachment as a non-resident corporation, solvent, and with no proceedings pending against it for any act committed under section 5242 of the Laws of the United States, it is clearly subject to the laws of this state regulating

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attachments against non-residents and foreign corporations (*Cooke* agt. *National Bank of Boston*, 52 *N. Y.*, 96; *Bowen* agt. *First National Bank of Medina*, 34 *How.*, 409; *Southwick* agt. *First National Bank of Memphis*, 7 *Hun.*, 96). The change made by the Revised Statutes of the United States, section 5242 and 5198 of the Laws of 1874, does not alter the above rule or apply to any banking corporations except *insolvent* ones. The attention of the court, in the cases of *Rhoner* agt. *National Bank of Allentown, Penn.* (14 *Hun.*, 126), and the *Central National Bank* agt. *Richland N. B. of M.* (52 *How. P. R.*, 136), was not called to the change of sections and the transpositions under another head of the statute and for other and wise purposes.

SMITH, J.—The defendant is a banking corporation, created under the national banking law of congress, and located and doing business at New Berne, in the state of North Carolina. Upon an affidavit showing these facts and showing that the defendant is indebted to the plaintiff on contract and has personal property within this state a warrant of attachment was issued by a justice of this court against the defendant before final judgment. The appellant contends that the attachment is void for want of jurisdiction in this court to issue it. The claim is based upon the last clause of section 5242 of the United States Revised Statutes (*ed. of 1878*), the whole of which section is as follows:

“§ 5242. All transfer of the notes, bonds, bills of exchange, or other evidence of debt, owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either made after the commission of any act of insolvency or in contemplation thereof made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view

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to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court."

For the plaintiff, it is contended that the prohibition of the last clause applies only to such national banks as are described in the preceding part of the section, that is to say, such as have committed or are contemplating an act of insolvency. We are inclined to think that construction correct, and that the purpose of the clause is to prevent creditors of insolvent national banks from obtaining preferences before final judgment. The language certainly admits of that construction, and we should be unwilling to infer, from doubtful and ambiguous language, an intention on the part of congress to divest the state courts of a pre-existing jurisdiction, even as to a provisional remedy merely. But, under our present Code, it would seem that if our state courts have not jurisdiction to attach the property of a foreign bank within the states, there is no mode in which jurisdiction can be acquired of such bank, unless one of its officers can be found within the state, for the purpose of making personal service. Section 636 provides that a warrant of attachment may be issued against a foreign corporation (*sub.* 2); and a bank created by act of congress is a foreign corporation (*Temp. Act, L. 1876, C. 449, sec. 2, sub. 16*). Section 707 provides that where a defendant, who has not appeared, is a foreign corporation, and the summons was served without the state or by publication, the judgment can be enforced only against the property which has been levied upon by virtue of the warrant of attachment at the time when the judgment is entered; so that if the claim under consideration applies to all national banks located without the state, it divests the courts of the state of all jurisdiction over such banks, so long as their officers keep without the limits of the state, a construction lead-

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ing to that result ought not to be given to doubtful language (*Cooke agt. State National Bank of Boston*, 52 N. Y., 96).

This view of the proper construction of the clause is strengthened by the course of the legislation of congress in respect to it. The original national bank act (L. 1863-'64, No. 85) did not contain the clause in question. But section 57 of that act provided that suits against any association under the act might be had in any circuit, district or territorial court of the United States, held within the district in which such association was established; or in any state, county or municipal court in the county or city in which said institution was located, having jurisdiction in similar cases; that section has been held by our court of appeals to be permissive and not mandatory (*Cooke agt. N. B. of Boston, supra*). In March, 1873, section 57 was amended by adding to it the words: "Provided, further, that no attachment, injunction or execution shall be issued against such association or its property before final judgment in any *such* suit, action or proceeding in any state, county or municipal court." It was held by the general term in the first department that the prohibition contained in that amendment related only to suits, &c., against associations located where the suit is brought, and not to cases where the action is against a non-resident corporation (*Southwick agt. The First National Bank of Memphis*, 7 Hun, 96). By the revision of 1874 the clause in question was detached from the section to which it was originally appended and was placed in section 5242 above quoted, and the word "such," above italicized, was omitted. The remainder of section 57 has been added to section 5198 of the Revised Statutes (*Stat. at Large*, 1873-'75, app. p. 1437; U. S. R. S. [2d ed.], sec. 5198).

It is a circumstance of no little importance in determining the question of construction under consideration, that the section in which the clause referred to is now placed forms a part of that chapter of the title relating to national banks, which treats of their "dissolution and receivership;" and

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the remainder of the section clearly relates to insolvent associations only. Thus the allocation of the clause in question, as well as its verbiage, and the general rule of interpretation, above-mentioned, seem to indicate, very clearly, that the construction contended for by the plaintiff is the true one.

The appellant's counsel cites the case of *The Central National Bank agt. The Richmond National Bank of Mansfield* (52 How. Pr. R., 163), decided at special term by Mr. justice BARRETT, and the general term case of *Rhoner agt. The First National Bank of Allentown* (14 Hun, 126), which hold that an attachment cannot be issued against a national bank before final judgment even though it has property within this state, and is located and carries on business in another state. In the latter case the court seems to have followed the reasoning of the judge at special term in the former case. In neither of the cases does it appear that the attention of the court was called to the fact that section 5242 is placed in the chapter relating to "dissolution and receivership." The opinions delivered do not advert to that circumstance nor to the language of the remainder of the section in which the clause is found.

Furthermore, in each case, stress is laid upon the consideration that the prohibition did not interfere with the general jurisdiction of the state courts over national banks.

Those cases seem to have arisen under the Code of Procedure, which did not contain the provision of section 707 of the present Code already adverted to. That section contains the substance of Rule 34 referred to by judge BARRETT. It is also to be observed that for ought that appears in the report of those cases, the defendants were insolvent. We think, therefore, those cases do not aid us in disposing of the present question.

Our conclusion is, that the order refusing to vacate the attachment should be affirmed, with ten dollars costs and disbursements.

TALCOTT, P. J., and HARDIN J., concur.

Swinburne agt. Stockwell.

SUPREME COURT.

FITCH J. SWINBURNE agt. JAMES STOCKWELL, as sheriff,
WILLIAM D. CLARK and JOHN MCKINZIE.

Answer—Sufficiency of denial—Effect of insufficient denial—Frivolousness.

A denial in an answer, "upon information and belief," is not authorized by the Code, and is insufficient.

Where there is no sufficient denial for the purposes of the action, the complaint is admitted. Facts set forth as a defense in an answer, inconsistent with the complaint, cannot be construed as a denial, so as to prevent the allegations of the complaint from being taken as true.

A pleading will be held frivolous where there is a decision in point adverse to its sufficiency.

That the answers were interposed in good faith, if frivolous, will not furnish any defense to a motion for judgment on such answers, but is good reason for allowing an amendment.

Special Term, August, 1879.

MOTION for judgment upon the several answers herein as frivolous, also upon all the pleadings for an order striking out the defendant's answers as sham.

Plaintiff, in person, for motion.

W. D. Brennan, opposed.

TAPPAN, J. — The denial in each of the answers, upon information and belief, is not authorized by the Code, and is insufficient (*Code of C. P.*, sec. 500; *Powers agt. R.*, *W. and O. R. R. Co.*, 3 *Hun*, 285, and cases there cited).

There being no sufficient denial for the purposes of the action, the complaint is admitted (*Code of C. P.*, sec. 522).

The facts set forth in the second defense in defendants' answer, inconsistent with the complaint, cannot be construed as a denial of it. The complaint being admitted, evidence could not be given under the second defense (*Wood agt. Whit-*

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ney, 21 *Barb. S. C. R.*, 190; *West* agt. *N. Ex. Bk.*, 44 *Barb. S. C. R.*, 176).

The pleadings will be held frivolous when there is a decision in point adverse to its sufficiency (*Bliss Code*, 405, *cases cited in note*).

The answers are frivolous, but were interposed in good faith.

This will not furnish any defense to the motion (*Hecker* agt. *Mitchell*, 5 *Abb.*, 453), but is good reason for allowing an amendment.

Judgment for plaintiff with costs and ten dollars costs of motion, unless defendants amend within ten days after service of a copy of the order.

N. Y. COMMON PLEAS

MARY NEWBURGER *et al.* agt. JAMES CAMPBELL.

Attorneys and counselors — Effect of allowing a party to appear and conduct a cause who is not regularly admitted to practice — Code of Civil Procedure, sections 63, 64.

Where a judge knowingly permits to practice in his court a person not regularly admitted to practice, his judgment, rendered in a cause so conducted in violation of law, is void and will be reversed.

General Term, March, 1880.

Before DALY, Ch. J., J. F. DALY and VAN HOESEN, JJ.

APPEAL from judgment rendered by justice CHARLES D. INGERSOLL, of the seventh district court, August 12, 1879, upon the verdict of a jury in favor of plaintiffs for goods sold and delivered.

Mr. Van Winkle appears on the return as attorney of record for plaintiffs.

Mr. Maccabe, for defendant.

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On the trial Mr. Arthur Furber, the managing clerk of Mr. Van Winkle, conducted the case for plaintiffs. He offered himself, on rebuttal, as a witness to prove an interview with defendant. On cross-examination he was asked if he were an attorney and counselor at law and he said he was not. On his subsequently beginning to cross-examine a witness of defendant, defendant's counsel objected that he was not duly authorized to appear and that the court has been imposed upon by his appearing and conducting the case. The court took no notice of the objection and Mr. Furber conducted the case to the end.

On appeal to the general term of the court of common pleas :

Mr. Jerolamon, for defendant, appellant.

Mr. Van Winkle, for plaintiff, respondent.

After hearing counsel :

THE CHIEF JUSTICE — As this is an important question the reporter will take the judgment of the court as expressed by the judges.

J. F. DALY, *J.* — The notice of appeal recites, as a ground of appeal, that the justice permitted the cause to be tried, upon the part of the plaintiffs, by a gentleman who was not an attorney and counselor at law, and it appears, from the return, that the objection was duly made by the defendant's counsel, as soon as it was disclosed by the evidence of Mr. Furber (the gentleman in question), that he was not duly admitted to practice. The justice, nevertheless, permitted him to go on and try the case to the end contrary to the provision of the Code (*secs. 63 and 64*). As it is declared by the latter section to be a misdemeanor for the judge to knowingly permit to practice in his court a person not regularly admitted to practice, we are of opinion that his judgment,

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rendered in a cause so conducted in violation of law, is void and must be reversed.

VAN HOESSEN, J. — After it appeared that Mr. Furber was not an attorney the justice committed a misdemeanor in permitting him to continue longer to conduct the case for the plaintiffs. That misdemeanor necessarily affected the subsequent proceedings. To say that because the justice might be indicted for permitting Mr. Furber to continue in the trial the defendant cannot complain of the misdemeanor, is to say that a suitor cannot object that a judgment against him was rendered by proceedings which violated a statute of the state, if those proceedings constitute an indictable offense.

A motion for leave to go to the court of appeals was denied, the chief justice stating: "We think we could not make the certificate which the law requires to send this case to the court of appeals."

SUPREME COURT.

THE THAYER MANUFACTURING JEWELRY COMPANY agt.
ABRAHAM STEINAU.

*Motion for new trial on the judge's minutes—when and where to be made—
Practice—Code of Civil Procedure, sections 997, 998, 999, 1002.*

A motion for a new trial, made upon the minutes of the judge presiding at the trial, can only be made before him at the same term in which the trial was had.

For the purposes of such motion, it is not necessary to make a case. The proceedings being fresh, the judge's minutes are presumed to disclose the error, if any exists.

When a motion for a new trial is made at special term, it should be founded upon a case made and settled according to the rules and practice of the court. In no other way can it be well determined by a judge, other than the one who tried the cause, what transpired at the trial and what questions distinctly arose.

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An omission to move for a new trial on the minutes during the trial term, under section 999 of the Code of Civil Procedure, cannot be cured by a subsequent direction of the judge before whom the trial was had, after the end of the term, that such motion be made at the special term upon the minutes of the judge who presided at the trial.

Special Term, 1880.

Michael H. Cardozo, for plaintiff.

Sandford H. Steele, for defendant.

VAN VORST, J.—The motion for a new trial made upon the minutes of the judge presiding at the trial can only be made before him, at the same term in which the trial was had (*Code of Civil Procedure, sec. 999*).

For the purposes of such motion it is not necessary to make a case. The proceedings being fresh the judge's minutes are presumed to disclose the error, if any exists (*sec. 998*).

In the case under consideration a motion is made at the special term, upon the minutes of the judge who presided at the circuit in January last, for a new trial, upon the ground that the verdict and judgment are contrary to law.

No case has been made. I am persuaded that this practice is irregular and that the proceedings of the trial cannot, in such manner, be reviewed.

It is argued, in support of the practice, that the learned judge before whom the trial was had has so directed.

This direction of the justice was made after the end of the term during which the trial was had. An omission to move for a new trial on the minutes during the trial term, under section 999 cannot be cured by such subsequent direction. When a motion for a new trial is made at special term, it should be founded upon a case made and settled according to the rules and practice of the court. In no other way can it be well determined by a judge, other than the one who tried the cause, what transpired at the trial and what questions distinctly arose (*Code, sec. 997*).

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It is suggested by the moving party that section 1002 provides for a contingency upon which a motion for a new trial founded upon an allegation of error in a ruling upon the law, made by the judge upon the trial, may be heard before another judge upon the direction of the trial judge. But there is nothing stated in section 1002 from which it can be inferred that a motion for a new trial can be brought on at special term, otherwise than upon a case, or that the trial judge can, by a direction made by him after the expiration of the trial term, order a motion for a new trial to be heard on his minutes before another judge, as that would be reaching by indirection what cannot be directly done.

Without, therefore, passing upon the question as to whether any error was committed on the trial, and without prejudice to the rights of the moving party to move at special term in the accustomed way upon a case, the present application is denied upon the preliminary objection taken.

As the question is new no costs of this motion are allowed.

SUPREME COURT.

SARAH A. PURSELL, respondent, agt. JOHN FRY and another,
as executors of RICHARD HINDS, deceased, appellants.

Executors — action against — Costs — when allowed and when not — When a legatee under a will competent witness in action against executors to prove employment of plaintiff by deceased father — Statute of limitations — Simple admission by plaintiff of defendant's counter-claim takes a case out of the statute — Married woman — when her earnings belong to her and are recoverable by her.

In an action by plaintiff, against the executors of her father, to recover for her services performed for the deceased, at his instance and request, on the trial, in support of her claim, she called Mrs. Boyd, one of her sisters, a legatee named in the will of their deceased father, and she gave evidence tending to establish an employment of plaintiff by deceased, and an agreement to pay her wages if she would go to the house of the deceased testator and take charge of the housework and

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personally care for his wife, their mother, who was afflicted with paralysis. Subsequently in the case, her husband, Mr. Boyd, was called, and gave evidence tending to support an agreement to pay wages, and tending to show several payments made by the deceased on account thereof:

Held, that Mrs. B. was not "called in her own behalf or interest," and was, therefore, competent as a witness in behalf of plaintiff.

Held, also, that the husband, Mr. B., was a competent witness.

The legacy given to the plaintiff by the testator cannot be deemed a satisfaction of the plaintiff's claim for services, as there is nothing in the case to justify an inference that such was the intention of the testator. Where one enters into the service of another, such service continuing for many years, the master paying various sums of money from time to time on account of such services:

Held, that the payments made were acknowledgments of the indebtedness and sufficient to take the whole claim out of the statute of limitations.

Held, further, that the claim of the plaintiff, at any and all times, for previous services, was an entire account, and she could have maintained but a single cause of action thereon; and that a payment by the intestate upon the balance due the claimant took the entire balance out of the operation of the statute.

Interest is not recoverable upon an unliquidated demand for services performed for the testator, where there was no price or time of payment stipulated between the parties, or to be inferred from the facts, and where there is no proof of any usage on the subject.

Where the plaintiff, at the time she entered into the service of the testator, was a married woman, but she had separated from her husband and was supporting herself, and, apparently, never received any further attention or support from her husband after her separation from him:

Held, that, under such circumstances, her earnings belonged to her, and were recoverable by her, and not by her husband.

Where the claim was presented to the executors for \$1,151.50, which the executors rejected and offered to refer, and under a stipulation of the parties the same was referred, the plaintiff recovering only \$674, there being no proof of bad faith or mismanagement on the part of the executors:

Held, that plaintiff was not entitled to recover costs against the executors, and that her rights were limited to the referee's and witness fees, and other necessary disbursements, to be taxed according to law.

Fourth Department, General Term, January, 1880.

THE plaintiff presented her claims for her services performed for the deceased, at his instance and request, to his

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executors and they disputed it and rejected it and a reference was agreed upon and approved by the surrogate. A motion was made to confirm the referee's report and for costs, and it was granted at special term.

A motion was made, upon a case and exceptions, to set aside the report, and denied at special term.

The defendants appeal from such order and the judgment entered therein.

Charles M. Williams (Fanning & Williams), for appellants, argued :

I. The evidence of Mrs. Boyd, a legatee under the will, was improper ; it was a "personal transaction" (*Fisher agt. Verplanck, Ex.*, 17 *Hun*, 151 ; *Somerville agt. Crook*, 9 *Hun*, 667 ; *Denham agt. Jayne*, 3 *Hun*, 614 ; *Rowell agt. Van Sicle*, 6 *Hun*, 115 ; *Baldwin agt. Smith*, 5 *Hun*, 454 ; *Kerr agt. McGuire*, 28 *N. Y.*, 452).

II. The rule of section 399, old Code, has not been changed by section 829, new Code. Interest in the *event* is the test ; otherwise *cross-examination* would be an examination in her own behalf (*Throop's Code, notes, foot of page 162* ; *Gifford agt. Sackett*, 15 *Hun*, 79 ; *Le Clare agt. Stewart*, 8 *Hun*, 127, and note to 2 *Abbott's New Cases*, 8-12).

III. The same rule applies as to "conversations overheard" by witness. The evidence was as much "a personal transaction" as the other (*Simmons agt. Sissons*, 26 *N. Y.*, 277 ; *Lobdell agt. Lobdell*, 36 *N. Y.*, 333 and *Cary agt. White*, 59 *N. Y.*, 331, were distinguished in *Brague agt. Lord* [41 *N. Y. Superior Ct.*, 193 ; *S. C.*, 67 *N. Y.*, 498] and 2 *Abb. New Cases*, 1-12). We claim that an ordinary conversation cannot be *split up into parts*. The *whole dialogue* must be given, and it being "personal" in part was inadmissible (*Lobdell agt. Lobdell*, 32 *How.*, 1-13 ; 67 *N. Y.*, 498, *supra* ; *Howell agt. Taylor*, 11 *Hun*, 215).

IV. The testimony of Boyd, husband of legatee, was likewise inadmissible. He was "interested" (*Warne agt. Dyett*,

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2 *Edwod. Ch.*, 497; *Hasbrouck agt. Vandervoort*, 9 *N. Y.*, 153-161; *Hosack agt. Rogers*, 8 *Paige Ch.*, 229-242; *Throop's note to 830 new Code*).

V. Plaintiff being a married women cannot maintain this action. The common-law rule is not changed by the enabling statutes. In the absence of evidence, her husband will be presumed to be with her when she returned to housekeeping in 1873. The husband, alone, can maintain this action (*Beau agt. Kiah*, 4 *Hun*, 171; *Carpenter agt. Weller*, 15 *Hun*, 134; *Cuck agt. Quackenbush*, 13 *Hun*, 108; *McKavlen agt. Bresslin*, 8 *Grey [Mass.]*, 177).

VI. The presumption of "domestic relation" was not overcome, and prevails. Expectation of pay on both sides was not shown (*Wood on Master and Servant*, 115, 121-127; *Sherley agt. Vail*, 38 *How. Pr.*, 409; *Dye agt. Kerr*, 15 *Barb.*, 444; *Williams agt. Hutchinson*, 5 *Barb.*, 122; *Conger agt. Van Aernum*, 43 *Barb.*, 602; 15 *Hun*, *supra*; see, also, 9 *American R.*, 559; 47 *Penn. St. R.*, 534; 29 *Penn. St. R.*, 465; 16 *Vermont*, 150; 25 *N. J. Eq.*, 150; *Robinson agt. Cushman*, 2 *Denio*, 119-122).

VII. The referee's findings are not conclusive. The general term have power, and it is their duty, to examine the whole evidence (*Nason agt. Luddington*, 19 *A. L. J.*, 179; *Godfrey agt. Moser*, 66 *N. Y.*, 252; *Meyer agt. Beach*, 14 *Hun*, 235; *Finch agt. Parker*, 49 *N. Y.*, 1-8; *Hubbell agt. Meigs*, 50 *N. Y.*, 480; *Townsend Mfg. Co. agt. Foster*, 51 *Barb.*, 346-350).

VIII. The legacy left to plaintiff will be deemed, in law, a satisfaction of her claim (*Eaton agt. Benton*, 2 *Hill*, 576-580). The evidence all points to a future reward, viz., the legacy (*Sherley agt. Vail*, 38 *How. Pr.*, 409).

IX. The statute of limitation applies to services prior to 1871. The services of plaintiff were, in any event, from year to year and are not continuous account (*Davis agt. Gorton*, 16 *N. Y.*, 255; *Conger agt. Van Aernum*, 43 *Barb.*, 602-605), otherwise it would be void under statute of frauds, not being

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in writing, as not to be performed in one year (3 *R. S.* [6th ed.], p. 142). The simple admission by plaintiff of \$158 of defendant's counter-claim does not create a payment or make an account (*Fisher* agt. *Verplanck*, 17 *Hun*, 151, 152; *Cuck* agt. *Quackenbush*, 13 *Hun*, 108; see, also, 5 *Bosworth*, 226, 234.)

X. There was nothing proved in the nature of an *acknowledgment* or a *new promise*. Payment is not decisive but only a matter of evidence (*Pickett* agt. *King*, 34 *Barb*, 193; *Harper* agt. *Farley*, 53 *N. Y.*, 442.) Testator kept no accounts. His books contained accounts with his son, but none with plaintiff. The case is distinguishable, therefore, from *Smith* agt. *Viele* (60 *N. Y.*, 377) where an account was kept. The case of *Bogert* agt. *Morse* (1 *N. Y.*, 377) applies to *strangers* only. Here the "*domestic relation*" continues; even grant that the admission of counter-claim was for money paid, *non sequitur* that it was upon an account. It should be construed as money given for necessities in the domestic relation.

XI. The referee entirely overlooked \$150 and \$250 received by plaintiff from testator. There is no escape but that this \$400 should be applied. "A fact presented and overlooked does not justify the judgment and avoids the referee's conclusions of law" (*Briggs* agt. *Boyd*, 56 *N. Y.*, 289; *Caswell* agt. *Davis*, 58 *N. Y.*, 223, 229).

XII. It was error to allow interest (*Godfrey* agt. *Moser*, 5 *T. & C.*, 677; *Holmes* agt. *Rankin*, 17 *Barb.*, 454; *McKnight* agt. *Dunlap*, 4 *Barb.*, 36, 37).

XIII. It was error to allow costs. Only disbursements are recoverable. The claim was reduced nearly one-half (3 *R. S.* [6th ed.], p. 97, sec. 52 [41]; *Old Code*, sec. 317; *Pinkerelli* agt. *Beschoff*, 2 *Abb. N. C.*, 107; *Carhart* agt. *Blaisdell*, *Executor*, 18 *Wend.*, 531; *Cruikshank* agt. *Cruikshank*, 9 *How. Pr.*, 350; *Buckhardt* agt. *Hunt*, 16 *How.*, 407; *Wooden* agt. *Bayley*, 13 *Wend.*, 453; *Comstock* agt. *Olmstead*, 6 *How. Pr.*, 77).

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XIV. The judgment and order should be reversed and new trial ordered before another referee.

Horace McGuire, for respondent.

HARDIN, J. — In support of the plaintiff's claim she called one of her sisters, a Mrs. Boyd, and a legatee named in the will of their deceased father, and she gave evidence tending to establish an employment of the plaintiff by the deceased and an agreement to pay her wages if she would go to the house of the deceased testator and take charge of the housework and personally care for his wife, their mother, who was afflicted with paralysis.

This evidence was objected to upon the ground that she was not competent to give evidence relating to personal transactions with her deceased father against his executors.

The objection was overruled and an exception taken by the defendants.

We think the ruling of the learned referee was correct (*Code of Civil Procedure*, sec. 829; *Hill* agt. *Alvord*, 4th dept., op. HARDIN, J.; *Albina Ely* agt. *Clute*, opinion TALCOTT, P. J., decided October, 1879). She was not "called in her own behalf or interest."

Subsequently, in the case, her husband, Mr. Boyd, was called and gave evidence tending to support an agreement to pay wages, and tending to show several payments made by the deceased on account thereof.

His evidence was objected to and received, and an exception taken.

For the reason already stated, it is apparent that his wife was competent as a witness in behalf of the plaintiff, and, therefore, he was not incompetent.

Section 830 of the Code of Civil Procedure was repealed in 1878.

We think the evidence given by the Boyds, and by others competent to speak, abundantly established (1) the original

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employment of the plaintiff by the testator (2); his agreement to pay her wages (3); the performance of the services by her for the period allowed to her by the referee (4), and that her wages were worth the price allowed therefor by the referee.

We cannot infer from the language found in the will of the deceased, or from any oral evidence given upon the trial, that the legacy given to the plaintiff by the testator was intended as a payment and satisfaction for her wages while in his employment.

We cannot, therefore, deem it a satisfaction of the plaintiff's claim for services (*Boughton, Ex. agt. Mary Flint, Ex., 74 N. Y., 477*).

The referee has found that the plaintiff commenced work in May, 1867, and continued work up to the 18th of September, 1877, with the exception of two absences, and that the aggregate time worked was eight years or 416 weeks.

This finding is supported by the evidence. He also finds that no specific price for such service was agreed upon, and that the services were worth two dollars per week.

The evidence supports these findings.

When the plaintiff presented her claim to the executors, she stated several credits, amounting, in the aggregate, to \$158. When the executors had rejected the claim, and a reference under the statute had been agreed upon, the executors made up a statement of their counter-claim, and in it they charged her with several sums of money as having been advanced and paid to her by the deceased in each of the years embraced in the period of time covered by the services.

Upon the trial, the plaintiff admitted "so much of the counter-claim, as stated in the executors' list of items," as embraced cash received by her in 1867, and each successive year down to and inclusive of 1877, amounting, in the aggregate, to \$158.

These cash payments were allowed to the defendants, and \$158 deducted by the referee from the aggregate of the

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plaintiff's services, and a balance struck of \$674; and judgment ordered for that sum, with interest from the 24th of October, 1878.

It is insisted, by the learned counsel for the appellants, that the statute of limitations should have been allowed as a bar to any recovery for services accruing more than six years prior to the death of the testator.

We think this argument is unsound.

(1.) The payments made by the testator were acknowledgments of the indebtedness, and sufficient to take the whole claim out of the statute (*Rich agt. Niagara Savings Bank*, 3 *Hun*, 481; *Miller agt. Talcott*, 46 *Barb.*, 167, *Bowe agt. Gano*, 9 *Hun*, 6).

(2.) The claim of the plaintiff, at any and all times for previous services, was an entire account and she could have maintained but a single cause of action thereon, and that "a payment by the intestate upon the balance due the claimant took the entire balance out of the operation of the statute" (*Smith agt. Viele*, 60 *N. Y.*, 106).

We think the referee erred in allowing interest from October 24, 1878, to the date of his report, April 12, 1879. He has found that no price was agreed upon for the wages.

There was no admission of any balance due at the time the account was presented to the executors; on the contrary they rejected the whole demand.

It was unliquidated. There was no express agreement to pay interest; not any implied agreement, from custom or otherwise, shown to arise, and, according to the authorities, no interest was recoverable until the amount of the claim was ascertained and liquidated, as it was not capable of being ascertained by computation thereby (*Glass Factory agt. Reed*, 3 *Cow.*, 393; *S. C.*, 5 *Cow.*, 589, *approved and followed in Holmes agt. Rankin*, 17 *Barb.*, 456; *McMahan agt. Erie R. R. Co.*, 20 *N. Y.*, 469; *Smith agt. Viele*, 60 *N. Y.*, 106; *Godfrey agt. Moser*, 5 *Thompson*, 677; 75 *N. Y.*) We must order a new trial unless the plaintiff stipulate to deduct

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from the judgment the interest upon the amount of the recovery (\$674) from October 24, 1878, until the date of the report, April 12, 1879.

The evidence of Mrs. Boyd as to the \$250 advanced in 1877 did not establish an indebtedness of the plaintiff, it simply established a gift.

The same observations are true in respect to the evidence given by Mrs. Bailey as to the \$150 referred to in 1873.

The plaintiff, at the time she entered into the service of the testator, was a married woman; she had separated from her husband and was supporting herself, and, apparently, never received any further attention or support from her husband after her separation from him.

Under such circumstances her earnings belonged to her and were recoverable by her and not by her husband (*Chapter 172 of Laws of 1862; Brooks agt. Schweirin, 54 N. Y., 343; Adams agt. Houness, 62 Barb., 326; Birbeck agt. Anthony, 74 N. Y., 356*).

It was competent for her to make a bargain with the testator for her services and for compensation therefor, and after she had performed, it was too late for him or his executors to repudiate the bargain and refuse to pay her the fair value of her earnings (*62 Barb., supra; Willits agt. Sun Mutual, 45 N. Y., 45*).

We come now to consider the order awarding costs against the executors payable out of the estate.

(1.) The claim was presented to the executors, 24th of October, 1878, for \$1,151.50.

(2.) The executors rejected it, November 21, 1878, and offered to refer.

(3.) December 9th, of 1878, a stipulation was entered into by the parties to refer and the reference was approved by the surrogate and on the tenth of December an order was entered referring the claims, &c.

(4.) The plaintiff recovered only \$674.

(5.) The referee finds and certifies that the executors acted

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with prudence and in good faith in resisting the plaintiff's claim and for the sole purpose of administering their trust faithfully, and for the purpose of protecting the estate."

(6.) There was no proof of bad faith or mismanagement presented to the special term.

(7.) It appears that the price of the wages was not agreed upon by the plaintiff and the testator, and that witnesses differed largely as to value of the services.

The plaintiff charged and claimed three dollars per week.

The referee finds the value of the services two dollars per week.

Under such circumstances, we think, the plaintiff was not entitled to recover costs, and that her right was limited to the "referee fees and witness's, and other necessary disbursements to be taxed according to law" (*Section 317 of Code of Procedure*; *Packeraell agt. Bischoff*, 2 *Abb. New Cases*, 107; *Olmstead agt. Olmstead*, 6 *How.*, 77; *Fort agt. Gooding*, 9 *Barb.*, 388; *Buckhosit agt. Hunt*, 16 *How.*, 407; *Cruikshank agt. Cruikshank*, 9 *How.*, 350; *Carhart agt. Blaisdal, Ex.*, 18 *Wend.*, 521; 2 *R. S.*, sec. 41, page 88; *Wooden agt. Bagley*, 13 *Wend.*, 453).

The special term erred in awarding costs to the plaintiff, and the order must be modified by striking out so much thereof as awards costs to the plaintiff, and allowed to stand so far as it awards referee fees, witness fees and necessary disbursements to the plaintiff, and as so modified, affirmed.

We must reverse the judgment and order a new trial before another referee, with costs of the appeal to abide the event, unless the plaintiff shall stipulate to reduce the judgment by striking out the interest on \$674 from October 24, 1878, to April 12, 1879, in which case the judgment and order of confirmation of the referee's report will be affirmed as so modified, with costs of this appeal.

TALCOTT, P. J. and SMITH, J., concur.

The People *ex rel.* Murtaugh agt. Board of Assessors.

SUPREME COURT.

THE PEOPLE, &C., *ex rel.* JAMES MURTAUGH, agt. THE BOARD
OF ASSESSORS OF THE CITY OF NEW YORK.

*New York city — Damages by change of grade of streets — Powers of assessors
to alter lists — Mandamus.*

A person who, after the filing of the map changing the grade of a street, erects a building upon a lot fronting thereon, is not entitled to compensation for any damage sustained when the street is graded to conform with the new grade.

The board of assessors of the city of New York have power to alter or change the list of awards and assessments in cases of manifest error or mistake, even after the list has been advertised complete, and may do so of its own motion.

First Department, General Term, January, 1878.

Before DAVIS, P. J., BRADY and INGALLS, JJ.

William C. Whitney, counsel to the corporation, for appellants.

James A. Deering, for respondent.

APPEAL from an order directing a peremptory *mandamus* to issue.

BRADY, J. — In the year 1868, the commissioners of Central park, pursuant to the authority vested in them by chapter 697 of the Laws of 1867, changed the grade of One Hundred and First street.

In 1868, the relator became the owner of the premises to which this proceeding applies.

In 1870 or 1871, the relator built five houses on the land which he had acquired, and on the original or the grade established prior to his purchase.

In 1875, the common council directed the street, from the

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Ninth avenue to the Boulevard, to be regulated and graded in accordance with the change made as already stated.

In or about the month of May, 1877, the assessors made up an assessment list for the latter work, in which was included an allowance or award to the relator for damages to said eight houses on the front of his lots, by reason of said change of grade, of \$3,350, and advertised the list for objections. The allowance for damages was made under the belief that the houses were erected before the grade of the street was changed. Upon advertising for objections, it was ascertained by the assessors that the eight houses in question were erected two years after the new grade was established, and they thereupon struck out the allowance to him, and, upon his further application, disallowed his claim for damages to said eight houses, the frame buildings and the lands.

The relator, thereupon, moved on his affidavit, sworn to the 24th day of August, 1877, for a peremptory writ of *mandamus* setting forth substantially the facts as above stated, and claiming that by reason of the change of grade he had been obliged to raise all of the buildings except the frame house on the rear of lot No. 43, which had been sunk below the grade and the first story rendered untenable and worthless, and the ingress and egress from all of said buildings have been seriously inconvenienced and disturbed, all to his great loss and injury.

The motion was opposed on the affidavit of Mr. North, one of the assessors, that no damage or injury was done to the relator's lands or buildings by the change of grade of One Hundred and First street, but that any and all loss or expense suffered or incurred by the relator resulted from his own acts and negligence, and that the allowance first made to the relator was struck out and rescinded because made upon a mistake of the facts. The motion was granted, and, hence, this appeal.

The right of the relator to damages depended upon statutes authorizing an award thereof, and upon them only (*Radcliff*,

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Err., agt. *The Mayor*, 4 N. Y., 195), and there is no statute giving damages, or authorizing the award of damages, under the circumstances which signalize the relator's claim.

He built after the alterations of the grade, and having done so assumed, voluntarily, all the consequences of his act. He means, doubtless, to say, but does not in fact say, that he had no notice of the change and built "not knowing that a new grade was established for said street," but the filing of the map was notice (*act of 1867, chap. 697, sec. 3, supra*), and the presumptions are in favor of the regularity of the proceedings which resulted in that ceremony.

The damages awarded for the change of grade relate to the existing condition of the land when the alteration is declared, and not to such condition as may subsequently be established by the voluntary act of the owner (*Act of 1867, sec. 3*).

The language of the section applicable is as follows: "All damage to any land or to any building or other structure existing at the time of the passage of this act on any street, avenue, &c., shall be ascertained and paid in the manner specified in sections 3 and 4 of the act of 4th of March, 1852, chapter 52."

When the award was made by the board of assessors it was under the conviction that the houses had been erected prior to the change of the grade, and the error thus committed was subsequently corrected. The damages were allowed under the act of 1852 (*supra*) and 1867 (*supra*), and particularly under the provision of the act of 1852 which directs the assessors to "make a just and equitable award of the amount of such loss or damage to the owner or owners of such lands or tenements fronting on such street or avenues and opposite thereto and affected by such change of grade," and they were stricken out or disallowed under the provisions of the act of 1841, chapter 171, which directs the giving of notice of completion of the estimate and assessment by advertisement of that fact, and for objections and provides "and if after examining such objections, the commissioners or assessors shall not deem

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it proper to alter their assessment or having altered it there shall still be objections to the same, it shall be their duty to present such objections with the assessment to the court or persons authorized to confirm the same." The act of 1859, chapter 302, also provides that "the said board of assessors, or a majority thereof, *shall make all estimates and assessment, give all notices, receive and pass upon all objections* and certify to the common council in accordance with the existing laws relative to all such matters. The list is now, however, certified to the board of revision and correction (*Laws of 1861, chap. 308*) and that board possessed the power to correct such an error as that complained of, namely, the omission to make the award for damages which was the effect of disallowing what had been granted under, as shown, a misunderstanding of the facts (*Laws 1872, chap. 580*).

The act of 1841, however, in express terms, gives the assessors power to alter the assessment list, and this power of alteration is not confined to express objections by persons assessed or to whom awards are made but to any objection made by the assessors, which in justice ought to be corrected. It is not necessary that the objections be in writing and by persons affected by the assessment, to give the assessors power to undo a wrong inadvertently done in the exercise of their functions. The proposition seems to be too plain for argument. The counsel for the relator has shown much industry and ingenuity in the preparation of this appeal and has made the most of it, but in vain. There seems to be an imperfection in the law in this respect, namely, that by the filing of the map the new grade is established but it is not immediately incumbent upon the city to proceed with the alteration. The result is that the owner of the land must wait or having leveled or built up to the grade may then proceed with his building.

The order appealed from must, however, be reversed with ten dollars costs and the disbursements of this appeal.

DAVIS, P. J., and INGALLS, J., concurred.

Armstrong *et al.* agt. Cummings and Ingersoll.

N. Y. SUPREME COURT.

ETTA ARMSTRONG *et al.*, respondents, agt. HENRY M. CUMMINGS
and CHARLES D. INGERSOLL, appellants.

Summary proceedings for non-payment of rent — that furniture is embraced in the demise does not deprive the landlord of the summary remedy — What need not be stated in landlord's affidavit.

The court will take judicial notice of the statutes creating the wards embraced within the jurisdiction of the several judicial district courts, and the fact that the premises are within the district of the justice who issues process in summary proceedings need not, therefore, be stated in the landlord's affidavit.

The fact that furniture is embraced in a demise of land does not deprive the landlord of the summary remedy furnished by the statute against tenants who fail to pay rent, or who hold over after the expiration of the term for which the premises were hired.

The rent issues out of the land and not out of the furniture, which is a mere incident of the demise.

First Department, General Term, January, 1880.

Before DAVIS, P. J., and BARRETT, J.

APPEAL from an injunction order restraining the defendant Ingersoll from issuing a warrant (in summary proceedings) to remove the plaintiff from certain premises, and restraining the defendant Cummings from taking any further steps to dispossess the plaintiff.

George J. Pett, for defendants, appellants.

H. H. Morange, for plaintiffs, respondents.

BARRETT, J. — The present injunction was granted on two grounds: First, that only the street and number, omitting the ward, was specified in the landlord's affidavit; second, that

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furniture was included in the lease. At the outset, it is apparent that this question could and should properly have been raised by *certiorari*. The statute expressly forbids any court or officer, by any writ or order, from staying or suspending such proceedings. There is an exceedingly limited class of cases where, for fraud, surprise or undue advantage in the actual conduct of the proceedings, courts of equity have interfered. But the proceedings in the case at bar were entirely regular; the tenant had every proper opportunity of being heard, and the present action is simply an irregular attempt to review the rulings of the justice. It is insisted that the justice was without jurisdiction. If that were so, it should have been proved, as a matter of fact, that the premises were not situated in either the Nineteenth or the Twenty-second ward. The absence of an affirmative statement on that head in the landlord's affidavit is no ground for what, in substance if not in form, is a writ of prohibition. Overruled objections to the preliminary affidavit can only be reviewed by *certiorari*.

Where, in truth, the subject-matter is not within the justice's jurisdiction, that fact is the *gravamen* of the complaint, and should be affirmatively averred and established. It is proper however, to say that the courts will take judicial notice of the statutes creating these wards, and, doing so, we find the premises in question within their boundaries. What has been said upon the subject of jurisdiction applies equally to the point with regard to the furniture.

But we have no doubt of the correctness of the justice's ruling. Rent, as defined by *Bouvier* and other writers, is "A return or compensation for the possession of some corporeal inheritance, and is a profit issuing out of lands or tenements in return for their use" (*See, too, Hilliard on Real Property*, 227; *Co. Littleton*, 141; *G.*, 2 *Black*, 42, note 53, [*Wends. ed.*]).

The furniture was but an incident. As was said by *BOOKES, J.*, in *Fay agt. Holloran* (35 *Barbour*, 297), "Rent cannot be reserved out of chattels personal. If such chattels are

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demised with land at an entire rent, the rent issues out of the land only" (*See, also, 2 Platt on Leases, p. 85; Archibald Land. and Tenant, marg. p. 106; Newman agt. Anderton, 2 Bosanquet & P. New R., 224*).

In the latter case it was held that the landlord is entitled to distrain for the rent of ready-furnished lodgings, **MANSFIELD**, C. J., observing that "it must occur constantly that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods, for rent cannot issue out of goods. So the lessor may declare on the demise of the land or the house without noticing the goods" (*2 Platt on Leases, p. 85, and cases cited*).

Were this otherwise, the statute would be perfectly valueless. If fully furnished houses are not within its provisions neither are the partially furnished. And so on; whenever the slightest element of personalty enters into the rental the statute becomes inapplicable, *e. g.*, if gas-fixtures are included, or a portable heater, or portable wash-tubs. This contention proceeds upon the idea that where the rent of premises and the hiring of furniture are mingled, there can be no apportionment. The fallacy of this reasoning becomes apparent when we consider the legal quality of the rent, and the rule that it issues solely out of the land. There is, therefore, no question of apportionment, and, consequently, no such practical inconvenience as the plaintiff suggests.

Upon this latter branch of the case we have been assisted by, and have substantially followed and adopted, the manuscript opinion of Mr. justice **MCADAM**, in the case of *Swigley agt. Jones* (*filed in the marine court, November 2, 1878*). If this opinion had been reported we would have contented ourselves with a simple reference to it.

The order appealed from should be reversed, with ten dollars costs and disbursements of the appeal, and the injunction dissolved.

DAVIS, P. J., concurred.

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The opinion filed in the marine court November 2, 1878, and referred to by judge BARRETT, is as follows :

N. Y. MARINE COURT.

IRA G. SWIGLEY, landlord, agt. J. ALFRED JONES, tenant.

Summary proceeding, tried October 23, 1878.

THIS is a summary proceeding under the statute to dispossess the tenant from the premises No. 41 West Forty-fifth street, in the city of New York, rented with the furniture therein, for a term commencing August 1, 1878, and ending May 1, 1879, at \$1,800 a year, payable monthly in advance. The proceeding is for non-payment of an installment of rent due under the lease, and the question presented for decision is, whether the proceeding to dispossess will lie, where, as in this case, the demise is a furnished house.

Mr. Dawson, for landlord.

Mr. Talman, for tenant.

McADAM, J. — The statute (3 R. S. [6th ed.], p. 824, sec. 28) provides that "any tenant or lessee" may be removed from demised premises, in case of holding over (sec. 28, *subd.* 1) or for non-payment of rent (*Ib.*, *subd.* 2). The conventional relation of landlord and tenant exists between the parties, an installment of rent is due, it has been duly demanded and remains unpaid, and yet the tenant's counsel claims that, because furniture was included in the demise, the landlord is not entitled to the summary remedy furnished by the statute, but must resort to some other mode of obtaining redress. This objection is without warrant in law.

Generally speaking, the rent issues of the whole premises demised, but if a house and furniture be comprised in a lease,

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the rent will issue out of the lands or house only; and the lessor may declare, as on a demise of the land or house, without noticing the goods (2 *Platt on Leases*, p. 58, and authorities cited).

At common law a landlord might distrain for rent in arrear, but only on a demise of corporeal hereditaments (*Archibald on Landlord and Tenant*, marg. p. 106), but, the landlord, nevertheless, might distrain for the rent of ready-furnished lodgings (*Newman agt. Anderton*, 2 *Bosanquet & Puller's New Rep.*, 224), for the rent was holden to issue out of the realty alone. Chief justice MANSFIELD, in the above case, said: "It must occur constantly that the value of demised premises is increased by the goods upon the premises, and yet the rent reserved still continues to issue out of the house or land, and not out of the goods; for rent cannot issue out of goods." In *Fay agt. Holloran* (35 *Barb.*, 297) the court said: "Rent cannot be reserved out of chattels personal. If such chattels are demised with the land, at an entire rent, the rent issues out of the land only," citing 2 *Black.*, 42, note, 53 (*Wendell's ed.*); 5 *Rep.*, 17 b.; 2 *New York*, 224. If this were not so the statute would have no application to furnished tenements, hotels, manufactories or saw-mills, because they contained furniture or steam power. It would have no application to any house wherein the landlord owned the gas-fixtures, portable heaters or wash-tubs, and let them with the premises. Indeed, the statute would have such a limited application that its usefulness would be destroyed and further legislation required.

But there is no cause for alarm, as the law is well settled. The remedy furnished by the statute extends to all of the cases just referred to. Such has been the construction this statute has almost invariably received since its passage in 1820 (*chap.* 194), and it is rather late at this day to attempt to put upon it the narrow and stinted construction contended for by the tenant's counsel. The landlord is entitled to judgment.

German Savings Bank agt. Habel *et al.*

NEW YORK COURT OF APPEALS.

THE GERMAN SAVINGS BANK, respondent, agt. AGATHE
HABEL *et al.*, appellants.

Injunction—in order to punish for a violation of, what should be embraced
in order.

In order to punish for a violation of an injunction, the order should
clearly embrace the act complained of.

Where an injunction was obtained restraining the prosecution of a certain
action in the marine court, or any steps to recover the \$400 on deposit
claimed therein:

Held, not to enjoin the plaintiff in the marine court action from collect-
ing certain costs awarded to it by that court prior to the injunction.

Decided March 2, 1880.

AN action was commenced in the marine court by the
defendant, Agathe Habel, against the plaintiffs, to recover a
deposit of \$400; the bank, disputing her title to the fund in
question, made a motion in the marine court to interplead
Henry Gunther, the executor of Carl Habel, as such execu-
tors, who claimed the fund.

This motion was granted to a certain extent; an appeal to
the general term of the marine court was taken by Mrs. Habel,
and the decision of the court below was reversed, and the sum
of twenty-nine dollars and eighty-five cents costs was awarded
to Mrs. Habel upon said appeal.

The bank thereafter commenced this action in the superior
court of the city of New York for an interpleader, and hav-
ing obtained therein a preliminary injunction, by which the
defendants and their attorneys were enjoined and restrained
from bringing, or further prosecuting, or carrying on any
action including said action in the marine court, or from
taking any steps or proceedings to recover the sum of \$400

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deposited with the plaintiff by the defendant's deceased husband, until further order of the court; this injunction was continued after trial and a judgment of interpleader.

The defendants' attorney issued a precept for the collection of the costs and disbursements awarded by the general term of the marine court and the bank moved, in the superior court, to punish the attorney for contempt and for a stay of proceedings under the precept. That court granted the motion, stayed the proceedings of the sheriff upon the precept and awarded ten dollars costs, to be paid by defendants' attorney, from which order this appeal was taken by Mrs. Habel and her attorney. The general term of the superior court affirmed the order and a further appeal was taken to the court of appeals. That court filed the following opinion :

Samuel Hand and *Henry Wehle*, for appellants.

S. Kaufman, for respondent.

PER CURIAM. — The injunction clause in the order did not prohibit the collection of the costs awarded, but the prosecution of the action, or any steps to recover the \$400 on deposit in the name of Habel.

Under these circumstances the costs were collectible, and the attorney was justified in issuing the precept. If it had been intended to prevent the collection of the costs the order should have been broad enough to cover them. That it was not so intended is shown by the fact sworn to, that the costs became due and an execution could have been issued for their collection before this action was commenced, and that the omission to do so was casual. The orders of the special and general term must be reversed and motion denied, with ten dollars costs of opposing motion and costs of appeal to the general term and to this court.

All concur.

Jordan agt. Van Epps.

SUPREME COURT.

ELIZABETH JORDAN, appellant, agt. JOHN C. VAN EPPS,
respondent.

Divorce — can a decree of, be attacked collaterally? — Dower — inchoate right of, can be determined and cut off by partition suit.

An inchoate right of dower can be determined and cut off by partition suit.

A woman whose dower has not been admeasured may be made a party defendant in a partition suit; and if she be made a party to such suit, under an allegation that she is entitled, or claims to be entitled, to dower, the decree is conclusive as to her homestead right.

A judgment rendered by a court having power lawfully conferred to deal with the general subject involved in the action having jurisdiction of the parties, although against the fact or without the facts to sustain it, is not void as rendered without jurisdiction, and cannot be questioned collaterally.

A purchaser under a sale in partition is protected against all irregularities in the judgment, or in the proceedings upon which it was founded, which do not affect the jurisdiction of the court over the subject-matter or the parties.

Can a decree of divorce be attacked collaterally by a party to such decree as against a third person? *Quare.*

Fourth Department, General Term, January, 1880.

APPEAL from a judgment of Monroe county court entered in favor of defendant, October 16, 1878, upon the verdict of a jury — of nonsuit by direction of the court, and from an order of the special county judge of Monroe county denying a new trial thereof.

This is an action of ejectment by plaintiff to recover an alleged dower interest, as the widow of one Christopher Jordan, in one acre of land in Rochester, New York, against the defendant, a purchaser under a partition sale. Summons was served on defendant October 26, 1877; complaint, November

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15, 1877. It alleges marriage of plaintiff October 28, 1850; the death of her husband, Christopher Jordan, March 14, 1876; conveyance by Christopher, March 18, 1852, of the premises in question, in which plaintiff did not join, and prays that the defendant deliver up the "undivided one-third" part of the described premises. Issue was joined by the service of defendant's answer November 27, 1877: (1.) It denies the date of plaintiff's marriage. (2.) Pleads in bar a divorce July 8, 1858, of her husband from plaintiff on the ground of adultery. (3.) Partition suit and deed thereunder, by which defendant came into and retains possession, the plaintiff herein being a party to the partition suit. The action was tried April 26, 1878, before Monroe county special judge and a jury. A verdict for defendant was given under direction of the court. Upon motion a new trial was denied October 14, 1878. Plaintiff's exceptions relate to the admission of the judgment roll of plaintiff's divorce, the judgment roll of partition, on the ground that they were "immaterial, incompetent and irrelevant," and to plaintiff's rejected offer to impeach, collaterally, the divorce of plaintiff's husband from her.

FACTS PROVEN.

Plaintiff and Christopher Jordan were married October 28, 1850; that said Christopher, at the time, was owner in fee of the premises in suit, and in possession at the time of his subsequent conveyance of them; that, March 18, 1852, he deeded them to George W. Jordan (a brother), in which conveyance the plaintiff Elizabeth did not join; a demand of defendant, who had made improvements since his partition deed, under which, among other things, he claimed title; that Christopher Jordan died March 14, 1876; that plaintiff and Christopher cohabited, after their marriage, up to the time they separated and he obtained a divorce from her; that they had trouble and separated about the time of the divorce, and afterwards she came back; that thereafter they occupied different rooms; that there was litigation in surrogate's court, after Christo-

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pher's decease, in which another woman claimed to be his wife; that on July 8, 1858, said Christopher obtained a divorce in New York supreme court (Monroe county) from Elizabeth (the plaintiff and appellant here) on the ground of her adultery; that the judgment roll therein is regular on its face and shows personal service of summons on said Elizabeth, her answer, testimony on her behalf before the referee trial, report and decree, and that she was represented by counsel who contested in her behalf at all stages of the case; that there was a partition suit of the premises in question, to which suit Elizabeth (appellant here) was a party, by personal service upon her, April 3, 1868, of the summons therein, and that, under the decree therein, defendant Van Epps was a purchaser and took possession of the premises under the referee's deed therein. The judgment roll in the partition suit showed that it extended from February 3, 1868, until March 3, 1876; that two reports of referees therein were made; the first one was a nullity for the proceedings were all dismissed and a trial *de novo* afterwards had, in which referee Mr. Dunning made a second and final report, in which he finds that Christopher obtained from said Elizabeth said divorce above mentioned and allows her no dower on said petition. Judgment of partition was accordingly entered March 3, 1876, the premises sold to Van Epps (respondent here) and sale confirmed; that said Elizabeth Jordan appeared and unsuccessfully opposed the confirmation of said partition sale against said Van Epps; that she also tried to vacate said sale on her alleged claim of dower, and was defeated at supreme court special term.

Fanning & Williams, for respondent, made and argued the following points:

I. Assuming the decree of divorce to be regular and valid the law is well settled that it bars the right of dower. The statute clearly is *penal* and bars all dower for a divorce for adultery (*Bingham on Real Estate*, page 648; *Scribner on*

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Dower, 2 vol., p. 515; *Willard on Real Estate*, p. 70; *Bishop on Marriage and Divorce*, vol. 2, secs. 706-708; *Schouler on Domestic Relations*, p. 185; *Hitts* agt. *Pitts*, 13 Abb. [N. S.], R., 272; S. C., 44 How., p. 264; S. C., 52 N. Y., 593; *Schiffer* agt. *Pruden*, 7 *Jones & Spencers' Superior Ct. R.*, 167; S. C., 64 N. Y., 51; *Cropsey* agt. *Ogden*, 11 N. Y., 228; *Reynolds* agt. *Reynolds*, 24 *Wend.*, 193-198; *Wait* agt. *Wait*, 4 *Barbour R.*, 192; S. C., 4 *Comstock*, 95, cited *Kade*, agt. *Lauber*, 48 How., p. 382; 5 *Wait's Sup. Ct. Practice*, 710; 3 R. S. [Banks & Bros. 6th ed.], p. 157, sec. 61; 2 R. S. [Banks & Bros. 6th ed.], p. 1120, sec. 188).

II. The divorce could not be collaterally impeached by Elizabeth Jordan in this action, as against the defendant Van Epps, either for fraud of Christopher Jordan or irregularity. A third person might perhaps attack it, but a party to the action could not attack or question as against a third person (*Freeman on Judgments*, sec. 33; 2 vol. *Phillips on Ev.*, 80; *People* agt. *Downing*, 4 *Sandf.*, 192; *People* agt. *Townshend*, 37 *Barb.*, 521; *Bush* agt. *Sheldon*, 1 *Day R.* [Conn.], 170; *McCraney* agt. *McCraney*, 5 *Iowa*, 232-250; *Greene* agt. *Greene*, 2 *Gray* [Mass.], 361-367; *Steen* agt. *Bennett*, 24 *Vermont*, 303; *Bishop on Marriage and Divorce*, 2 vol., sec. 760; *Herman on Estoppel*, 159; *Amory* agt. *Amory*, 3 *Bissell*, 266; *Granger* agt. *Clark*, 22 *Maine*, 128; *Davis* agt. *Davis*, 61 *Maine*, 398; *Martin* agt. *McLean*, 49 *Missouri*, 361; *Farrington* agt. *Bullard*, 40 *Barb.*, 513; *White* agt. *Merritt*, 7 N. Y., 353; *Ray* agt. *Ronley*, 4 T. & C., 431; *Romain* agt. *Garth*, 5 T. & C., 361; *Krekler* agt. *Ritter*, 62 N. Y., 373; 2 *Best on Evi.* [Wood's Notes], 1064 [739 marginal page]; *Casoniebal* agt. *Jerome*, 58 N. Y., 316-321; *Bragg* agt. *Loris*, 1 *Wood Ct. U. S.*, 209-211; *Ross* agt. *Wood*, 8 *Hun*, 185; *Allen* agt. *Martin*, 10 *Wend.*, 301; *Hahn* agt. *Kelly*, 34 *Cal. R.*, 391-402; *Weston* agt. *Haynes*, 49 *Missouri*, 263; *Waltrick* agt. *Friedman*, 71 N. Y., 601; *Welles* agt. *Thornton*, 45 *Barb.*, 391; *Pease* agt. *Whitten*, 31 *Maine*, 117; *Ross* agt. *Wood*, 8 *Hun*, 185;

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III. The plaintiff, Elizabeth Jordan, was estopped from questioning the divorce of Christopher (*Brown* agt. *Balder*, 3 *Lansing*, 284-290; *De Riemer et al.* agt. *Cantillon*, 4 *John's Ch. R.*, 85; *Bustard* agt. *Yates*, 4 *Dano* [*Ky.*], 447).

IV. The partition suit is a bar to this action. The plaintiff's right of dower in the premises was directly adjudicated in that action, and denied. It was in issue and passed upon. Van Epps being a purchaser under that decree can avail himself thereof. (*Brevoort* agt. *Brevoort et al.*, 70 *N. Y.* 140; *Howell* agt. *Mill*, 56 *N. Y.*, 226; *Castle et al.* agt. *Noyes*, 14 *N. Y.*, 329; *Casoni et al.* agt. *Jerome*, 58 *N. Y.*, 316, 321; 2 *Best on Evi.* [*Wood's Notes*], 1064 [739]; *Freeman on Judgments*, sec. 304; *Herman on Estoppel*, p. 98, sec. 92; *Scribner on Dower*, vol. 1, p. 331; *Tanner* agt. *Niles*, 1 *Barb.*, 561; *Jackson* agt. *Edwards*, 6 *Paige*, 387; *S. C.*, 29 *Wend.*, 517; *Mead* agt. *Mitchell*, 17 *N. Y.*, 210-217; *Wright* agt. *Dunning*, 46 *Ill.*, 211; *Clemens* agt. *Clemens*, 37 *N. Y.*, 72; *Bloomer* agt. *Sturgis*, 58 *N. Y.*, 176; *Blakely* agt. *Calder*, 15 *N. Y.*, 617; *Whittemore* agt. *Shaw*, 8 *N. H.*, 393; *Emberry* agt. *Conner*, 3 *Com.*, 511; *Pentz* agt. *Kenster*, 41 *Missouri*, 447-450; 5 *Wait's Pr.*, 116 and 182; *Moore* agt. *Mayor*, 8 *N. Y.*, 110; *Ehle* agt. *Brigham*, 7 *Barb.*, 494; *Jenkins* agt. *Fahy*, 18 *Alb. Law Jour.*, 157; *S. C.*, 7 *N. Y. Wkly. Dig.*, 148; *Wright* agt. *Dunning*, 46 *Ill.*, 281; *Carter* agt. *Nichols*, 42 *N. Y.*, 26; *Winston* agt. *Haynes*, 46 *Missouri*, 263; *Gerard's Abstract of Titles*, p. 622; *Spaulding*

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agt. *Baldwin*, 31 *Ind.*, 376; *Dorsey* agt. *Thompson*, 37 *Maryland*, 26-45; *Secombe* agt. *R. R.*, 23 *Wallace*, 109-118; *Woods* agt. *Lee*, 21 *Louisiana Annual R.*, 585; *McCahill* agt. *Equitable Co.*, 26 *N. J. Equity*, 531-536; *Yaple* agt. *Titus*, 41 *Penn.*, 195; *Lawrence* agt. *Hunt*, 10 *Wend.*, 81; *Kingsland* agt. *Spanliding*, 3 *Barb. Ch. R.*, 241; *Brickhead* agt. *Brown*, 5 *Sandf.*, 135; 1 *Greenleaf on Evi.*, sec. 189; *Whittlesey* agt. *Frautz*, 7 *N. Y. Wkly. Dig.*, 403; *Dwight* agt. *St. John*, 25 *N. Y.*, 203-205; *Stone* agt. *Flower*, 47 *N. Y.*, 566).

Daniel Wood, for appellant

TALCOTT, *P. J.* — This is an appeal from the judgment of the county court of Monroe county for the defendant, on the verdict of a jury and from an order denying a new trial in the case.

The action is ejectment for dower. The plaintiff having proved the *seizin* of her late husband, the possession of the defendant and her demand of dower in the premises rested; whereupon the defendant introduced and proved two judgment records, in the supreme court of this state.

(1.) A judgment in an action for a divorce instituted by Christopher Jordan, the late husband of the plaintiff, charging the plaintiff with various acts of adultery to which action the plaintiff appeared and defended, and which finally resulted in a decree of divorce *a vinculo*, on the ground of the adultery of the plaintiff, the record of which was filed July 8, 1858, in the office of the clerk of Monroe county where the parties then resided, and which judgment was conceded to be in all respects regular on its face.

(2.) A judgment roll in partition, in a suit wherein the said Christopher Jordan was plaintiff, and the said Elizabeth, the now plaintiff, one of the defendants under the decree, in which latter case, the premises in question were sold to the defendant in March, 1876. It appears that the partition suit was com-

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menced in 1868, but by reason of various delays was protracted, and resulted in a final decree for the sale of the premises in March, 1878. The proof of this judgment in partition was objected to by the plaintiff's counsel, on the ground that it was "irrelevant, incompetent and immaterial." The objection was overruled, and the judgment in partition, and the subsequent proceedings thereon were received in evidence, and the plaintiff excepted. The plaintiff's counsel also makes various objections to the effect of the judgment in the action for divorce, which was conceded to be regular on its face, claiming that as the plaintiff's *inchoate* right of dower was vested in her before the decree, and before the alleged act of adultery took place, such decree could not operate retrospectively to bar her dower.

The counsel for the plaintiff also offered, in substance, to prove that the entering of the decree in the action for the divorce was fraudulent as against the plaintiff, who, as was alleged, continued to reside with the said Christopher Jordan, as his wife, for many years after the said decree was obtained, and down to the time of his decease. In the disposition which we propose to make of the case, the various objections raised to the validity of the decree of divorce will not be considered, as we see no reason to doubt but that the decree in the action of partition and the sale under the same to the defendant is a bar to the plaintiff's action to recover the premises in question, which constituted the land sold under the decree and under which sale and purchase the defendant claims title.

The judgment record in the action for partition is not set out at length, but instead thereof, the case contained various recitals referring to the contents of that judgment record. From this circumstance it is difficult in all respects to fully understand all the proceedings in the partition suit, but as the appellant made up the bill of exceptions and has caused to be inserted therein these various detached recitals instead of the entire judgment record in partition, it will be assumed that the judgment in partition was in all respects regular, so far

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as any question relating to the jurisdiction of the court is concerned.

The complaint in the partition suit avers, that "the defendant Elizabeth Jordan claims an *inchoate* right of dower in said premises, as never having signed any deed or conveyance of said premises, which were conveyed by her husband Christopher Jordan in 1852, to George W. Jordan, in which conveyance she did not join."

This roll contained, among other things, "proof of service of summons and notice of the object of action on Elizabeth Jordan (plaintiff herein), personally, on April, 1868," and averred that the premises of which partition was sought were subject to the inchoate right of dower of the said Elizabeth Jordan, and that she failed to appear, or to put in any answer to the complaint, and that none of the defendants, except certain infants had appeared or answered, who appeared by *guardian ad litem* and answered, and the action was referred to a referee, who made a report which was confirmed by the court, and a decree was entered thereupon on the 26th of June, 1875. This decree states that Christopher Jordan (the plaintiff in the partition suit) is entitled to one undivided one-tenth part of the premises, and Elizabeth Jordan (the now plaintiff) to an *inchoate* right of dower in the one undivided one-tenth of said premises, and the decree provides that after the payment of certain sums for costs and debts, the referee "pay to the plaintiff, Christopher Jordan, and Elizabeth Jordan, one-tenth thereof."

This, we suppose, refers to the referee who was, by the said decree, directed to make a sale of the said premises under the decree which was entered June 26, 1875. It seems that the first decree was opened or set aside in September, 1875, in order to bring in new parties to the action in place of some who had died *pendente lite* leaving minor children, and by the order vacating first judgment any or all of the defendants were permitted to serve answer. A supplemental complaint was filed, and certain of the defendants put in answer, and a

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guardian was appointed for the infant defendants who put in the usual general answer, but Elizabeth Jordan did not appear or answer. The answer of the adults to the supplemental complaint denies none of the allegations of the complaint; a second reference then took place to the same or a new referee who found, among other things, that the said Christopher Jordan, before the commencement of the partition suit, "procured, in due form of law, an absolute decree of divorce, dissolving the marriage contract between the said plaintiff and said Elizabeth Jordan." The second report of the referee was confirmed March 1, 1876, and says nothing about the right of dower of said Elizabeth.

On the confirmation of the said second report the "usual decree of partition was made," which also ordered a sale of the premises, and directs that the referee, on the sale, shall execute a deed, and the purchaser shall be let into possession on production of the said referee's deed.

The counsel for the defendant then put in evidence the deed of the referee on the sale in partition, which purports to convey the whole premises described in the complaint in this action to the defendant. The deed recited the judgment and decree in the partition suit and the order directing the referee to execute the deed. It appeared that, after the sale in partition, Sarah R. Gaskins, one of the defendants in that suit, and Elizabeth Jordan (the now plaintiff) made a motion to set aside the sale in partition, and to order a resale.

This motion was heard at a special term of this court, on the 3d day of August, 1876, and appears to have been founded upon the judgment roll and all the papers in the partition suit, and, also, upon the affidavits of Sarah R. Gaskins and said Elizabeth Jordan, and the now plaintiff's attorney. What the grounds of the said motion were, it does not precisely appear, but, among other things, it would seem that the plaintiff in this suit still claimed a right of dower in the premises, and asked some kind of relief as to herself, founded on that circumstance; Van Epps, the defendant in this suit, appeared

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by his counsel, and his affidavit was read in opposition to that motion, and the motion to set aside the sale and for a resale was denied, and the referee's report of sale was confirmed.

The plaintiff's counsel, so far as we understand his position in reference to the decree and sale in partition, seems to claim that the plaintiff's right of dower in the premises was not contested or litigated in the partition case, and could not be, and that "a sale in partition does not cut off or affect a widow's dower, unless she consents, or is paid her dower interest as provided by the statute." We do not understand such to be the law; a brief reference to the statutes relating to the partition of real estate, clearly shows, in our opinion, that a woman whose dower has not been admeasured may be made a party defendant in such an action. It is expressly provided in 2 Revised Statutes (318, *p.* 412, *secs.* 5, 6) that she may be made a party to the partition. She may appear and answer on account of her interest, whether "such interest be present and vested or contingent" (*Id.*, *sec.* 16). We assume that the sale in this case was made upon the report of a referee and without the appointment of any commissioner.

The effect of the sale is declared by the Revised Statutes (2 *R. S.*, *p.* 377, *sec.* 62), which provides that the sale shall be a bar, both in law and equity, against all persons interested in such premises in any way, who shall have been named as parties in the said proceedings, and against all other persons claiming from such parties or either of them.

That it was intended that a sale under a judgment in partition should cut off an inchoate right of dower, is apparent from the provisions of chapter 177, of the act of 1840, entitled "An act for the better securing the interests of married women in lands sold under judgments or decree in partition." Section 1 of that act provides, that in all cases of sales under judgment or decree in partition, where it shall appear that any married woman has an inchoate right of dower in any lands divided or sold, or that any person has any vested or contingent future right or estate in such lands, it shall be the duty

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of the court under whose judgment or decree such sale is made to ascertain and settle the proportional value of such inchoate, contingent or vested right or estate according to the principles of law applicable to annuities and survivorship and to direct such proportion of the proceeds of the sale to be invested, secured or paid over in such manner as shall be judged best to secure and protect the right and interests of the parties."

From the statement of the judgment roll in partition which appears in the case, it seems that the right of the now plaintiff, Elizabeth Jordan, was admitted in the partition suit, and it does not appear upon what ground the decree omitted to provide for an ascertainment of the value of that right, whether by virtue of a release to her husband of such right, or by reason of the fact of such decree of divorce found by the referee. If it proceeded upon the latter ground the omission of the court to provide for the ascertainment of the value of such inchoate right of dower, under the act of 1840, was probably error, in respect to which the said Elizabeth might have had redress by an appeal from the judgment, inasmuch as it does not appear that there was any issue in the case under which the decree of divorce was admissible in evidence, and it is possible, from the statements contained in the bill of exceptions, that this was one of the grounds on which the now plaintiff moved to set aside the sale in the partition suit. But, however this may be in fact the judgment for a sale in the partition suit was not *void*, but should, if erroneous, have been corrected on appeal.

A judgment rendered by a court having power, lawfully conferred, to deal with the general subject involved in the action, and having jurisdiction of the parties, although against the facts or without the facts to sustain it, is not void, as rendered without jurisdiction, and cannot be questioned collaterally (*Hunt agt. Hunt*, 72 N. Y., 217; *Jenkins agt. Fahy*, 73 N. Y., 355).

A purchaser under a sale in partition is protected against

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all irregularities in the judgment, or in the proceedings upon which it was founded, which do not affect the jurisdiction of the court over the subject-matter or the parties (*Alvord agt. Beach*, 5 Abb., 451; *Jenkins agt. Fahey*, 73 N. Y., 355).

In this case the supreme court had general jurisdiction of the subject-matter, and by its process obtained jurisdiction of the person of the plaintiff, and we think, within the meaning of the statutes before referred to and the cases above cited, the defendant acquired a valid title to the premises by the sale on the judgment in partition and the conveyance to him on such sale.

The judgment of the county court and the order refusing a new trial are affirmed.

MONROE COUNTY COURT.

MARY E. MELLEN, respondent, agt. CHARLES D. HUTCHINS,
appellant.

Costs — Non-residents — when required to furnish security for costs.

A non-resident need not furnish security for costs if he begins suit in a justice court or municipal court, although such security could be compelled if suit was commenced in courts of record, but not when an appeal is taken to the county court.

March, 1880.

APPLICATION by respondent for commission to take testimony, and by appellant for security for costs.

Fanning & Williams, for respondent.

J. E. Roe, for appellant.

MORGAN, *Special County Judge*.— The respondent resides at Worcester, Mass.; the appellant in the city of Rochester,

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N. Y. The action was brought by long summons in the municipal court of the city of Rochester, which is not a court of record. Judgment was recovered in favor of the respondent, and from that judgment the appellant appeals to this court. The respondent applied for a commission to take her own testimony in Massachusetts, and that of a witness in Akron, Ohio, under section 887 *et seq* of Code. Upon the hearing of that application, the appellant objected that the respondent should file security for costs, and an order was then made for the respondent to show cause why she should not file such security, and the two applications were heard together. Upon the papers before me there seems to be good reason why the commissions should issue as applied for. The only question is whether security can be required to be filed by the respondent on the ground of her non-residence, under 2 Revised Statutes (*Edmonds ed.*, 644, section 1, clause 1) It was held in *Fennor agt. Dickinson* (4 *Denio*, 84) that an appeal to the court of common pleas, from a justice of the peace, is but a continuation of the proceedings previously had, or action begun in the justice's court. To the same effect is the case of *Traver agt. Nichols* (7 *Wend.*, 434). And it was held in the case of *The People agt. Common Pleas Judges* (1 *Cow.*, 576) that a court of common pleas could not require security beyond that prescribed by the statute, and could not require a defendant to give additional security because that given was insufficient.

It was also decided in *Payne agt. Hathaway* (4 *N. Y. Leg. Obs.*, 21) that a justice of the peace has no power to compel a non-resident plaintiff to file security for costs under the statute in consideration here, and that this statute only applies to courts of record. Under the statute of 1831 (*chap.* 300, *sec.* 32) the respondent being a non-resident of this county, might have been compelled to file security upon procuring a short summons. Whether being a non-resident she was entitled to a long summons is not necessarily to be considered here ; but I am compelled, by the decision in *Payne agt. Hathaway*

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(*supra*), to hold that the municipal court, not being a court of record, could not have compelled her to file security under the general statute relating to security for costs (2 *R. S.*, 644).

From the other cases above cited it seems equally clear that if the security for costs could not be compelled to be filed at the commencement of the action, the county court (which stands in the same relation to the municipal court as the court of common pleas held toward justices of the peace) cannot now compel security to be filed. The commission may, therefore, issue in the usual form and the respondent need not file security for costs; but, inasmuch as the question does not seem before to have been passed upon, so far at least as any cases have been called to my attention, neither party shall have costs of this application as against the other.

N. Y. SUPREME COURT.

THE PEOPLE *ex rel.* WILLIAM HANNIGAN agt. CHARLES D.
INGERSOLL, justice, &c.

Guardian of infant — His power to rent — Infant may affirm guardian's letting after he attains his majority — Effect of.

The guardian of an infant has authority to rent during the infant's minority, but no longer. The guardian has no interest in the lands, nothing but a naked authority. His control is limited to the rents and profits, and that ceases at the ward's majority.

Where the guardian lets for a term beyond the ward's infancy, and the ward on coming of age affirms the letting, he may, upon alleging the facts, sustain any proper action or proceeding thereon.

The conventional relation of landlord between the ward and the tenant exists in such a case, in the sense contemplated by the authorities and the grantee of the ward after his majority, as assignee of the landlord, is entitled to the like remedies.

First Department, General Term, January, 1880.

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THE facts appear in the following affidavit used before the justice:

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } *ss.* :

Mary Begen, being duly sworn, says that she is informed and verily believes, that William J. Davis, at the time of the letting hereinafter named, was the owner and landlord of the premises hereinafter described.

That said premises are situated within the seventh judicial district of the city of New York.

She further avers, on information and belief, that on or about the 1st day of May, 1878, the said William J. Davis, by John Whelan, his duly appointed guardian, let and rented unto William Hannegan, the whole of the second floor of premises known by the street No. 514 West Fifty-second street, in the city of New York, for the term of one year, commencing on the 1st day of May, 1878, and ending on the 1st day of May, 1879.

She further avers, on information and belief, that the said William J. Davis, arrived at the age of twenty-one years on the 14th December, 1878.

That since said letting, and on or about the 21st day of May, 1879, the said William J. Davis, by his deed, granted and conveyed said premises to this deponent.

That the term for which said premises were hired and let to the said William Hannegan, has expired, and that said William Hannegan, or his assigns, holds over and continues in possession of said premises, without the permission of the landlord or this deponent, after the expiration of his term.

MARY BEGEN.

Sworn to before me, this }
8th day of October, 1879. }

JOHN C. LAUG,
Notary Public, New York City and Co.

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The facts were controverted and the issue tried. The justice found for the landlord, and the tenant brought *certiorari* to review the justice's decision.

John Hardy, for relator, cited 2 *Willard on Executors*, 1137; *Lewin on Trusts*, p. 464 (560); *Downing agt. Marshall* (37 *N. Y.*, 580); *Benjamin agt. Benjamin* (5 *N. Y.*, 388); *The People agt. Williams* (11 *How. Pr.*, 83).

Jas. P. Campbell, for respondent, cited 1 *Parsons on Contracts*, 133; *Genet agt. Talmadge* (1 *John Ch. R.*, 561); *Pond agt. Curtis* (7 *Wend.*, 45); *Emerson agt. Spicer* (46 *N. Y.*, 594); *McAdam's L. and T.*, 12; 2 *R. S.*, 1131, sec. 7; *Livingston agt. Tanner* (14 *N. Y.*, 64); 2 *Kent's Com.* 239; *Field agt. Schieffelin* (7 *John. Ch.*, 154); *Emmons agt. Spicer* (46 *N. Y.*, 594); *Porter agt. Bleiler* (17 *Barb.*, 151); *Rowan agt. Lytle* (11 *Wend.*, 619); *Allen agt. Jaquish* (21 *Wend.*, 628).

BARRETT, J.—It is well settled that to authorize these summary proceedings the conventional relation of landlord and tenant must be shown to exist, and not a tenancy created by mere operation of law (*Benjamin agt. Benjamin*, 5 *N. Y.*, 388; *The People ex rel. Williams agt. Bigelow*, 11 *How. P.*, 83; *Roach agt. Cosine*, 9 *Wend.*, 227; *Simms agt. Humphrey*, 4 *Denio*, 185).

This conventional relation may be created by agreement, express or implied (*See opinion of SHelden, J., in The People agt. Simpson*, 28 *N. Y.*, 59).

Care must be taken to distinguish between a tenancy created by operation of law and an agreement implied by law from particular facts.

In the present case the infant Davis was vested with the title to the land. The rents belonged to him, and whatever the guardian did was for his benefit (*Porter agt. Bleiler*, 17 *Barb.*, 151).

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He could maintain an action for use and occupation, although he had a general guardian (*Ibid*).

Undoubtedly the guardian had authority to rent during the infant's minority, but no longer.

Whalen rented the premises to Hannigan for one year from the 1st day of May, 1878. Davis attained his majority on the 14th day of December, 1878. It seems, however, that Davis thereafter ratified Whalen's act, for he took no step in disaffirmance, permitted continued occupation, and must have demanded the rent. We infer the latter, from the fact that Whalen directed the tenant not to pay. Be that as it may, Davis, as landlord, could have maintained an action on the lease for the rent accruing subsequent to his majority. The suit of itself would be an affirmance.

In *Pond agt. Curtis* (7 *Wendell*, 45), an action in the guardian's name, even after the ward had attained his majority, was sustained. This was under the rules governing sealed instruments, and upon the further ground that there was nothing in the case to show that the suit was not actually brought by the ward in the name of his guardian who executed the lease. There was not a suggestion that the ward could not have maintained the action in his own name. On the contrary, SUTHERLAND, J., observes "that where the suit is brought in the guardian's name with the approbation of the ward and for his benefit, it is a question of form rather than of substance;" and, again, "I perceive no objection in principle to allowing the ward, in a case like this, to enforce the covenant made for his benefit in the name of his guardian." "It is to be intended that the suit is brought for the benefit of the ward, with his approbation, until the contrary is shown."

The guardian has no interest in the lands, nothing but a naked authority. His control is limited to the rents and profits, and that entirely ceases at the ward's majority.

Here the occupation by the tenant, with Davis' approbation, after the latter's majority, constituted between them the conventional relation of landlord and tenant. It was not a

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tenancy created by operation of law, but by and under the express agreement of May 1, 1878. That agreement was made on behalf of Davis and for his sole benefit. During his minority the guardian was authorized to reduce the rent to possession. Thereafter the ward was entitled to receive it himself, and to so receive it under the original agreement.

The operation of the law is not upon the creation of the tenancy but upon the right to proceed directly under the agreement.

Mary Begen, as the assignee of Davis, was authorized to institute summary proceedings.

There being nothing in any of the other points the proceedings and judgment of the justice must be affirmed, with costs.

DAVIS, C. J., concurred.

N. Y. SUPREME COURT.

WILLIAM H. TATOR agt. EBENEZER ADAMS, appellant, and JOHN MESICK and others, respondents, impleaded with others.

Referees — their power in proceedings to distribute surplus moneys.

In proceedings to distribute surplus moneys a question of fraud may be investigated before the referee, and every question may be examined tending to show the equities of the claimants.

Third Department, General Term, February, 1880.

Before LEARNED, P. J., BOARDMAN and BOOKES, JJ.

APPEAL from order of Mr. justice OSBORN, allowing exceptions to report of J. Rider Cady, Esq., referee in surplus-money proceedings. The claimant and appellant, Ebenezer Adams, had a mortgage upon the premises upon the sale of

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which, under a prior mortgage, the surplus moneys arose. It was conceded that this mortgage was the first lien upon the surplus moneys; that the draughtsmen of this mortgage through mistake, inserted in it a clause reserving to the mortgagor a life estate in the mortgaged premises; that neither mortgagor nor mortgagee intended to have any such reservation in the mortgage; that the draughtsmen in preparing the mortgage, copied the description of the mortgaged premises from a deed executed by the father of the mortgagor to him, in which the father reserved to himself a life estate in said premises and, generally, it was conceded, that as between mortgagee and mortgagor, the facts proven before the referee established a case for reformation of the mortgage.

After the giving and recording of the mortgage the several respondents on this appeal obtained and had docketed in Columbia county clerk's office (in which county said mortgaged premises are situated), judgments against said mortgagor and owner of the equity of redemption.

Upon the hearing before the referee in said surplus-money proceedings the several respondents, claimed (1) that a referee in surplus-money proceedings had not jurisdiction to hear and determine the question as to mutual mistake in appellant's mortgage, or to grant him any relief in regard thereto (2); that the appellant's mortgage could not be reformed so as to affect or exclude the lien of the several judgments docketed in favor of respondents against said mortgagor after the recording of the mortgage and prior to said surplus-money proceedings, and that said judgments were liens upon said life estate reserved to said mortgagor, to the exclusion of the lien of appellant's mortgage; that his mortgage was a lien simply upon the reversion.

Cornelius Esselstyn, for appellant, cited *Thomas on Mortgages*, 379; *Mutual Life Insurance Company agt. Bowen* (47 Barb., 618); *De Forest agt. Farley* (62 N. Y., 628); *Livingston agt. Mildrum* (19 N. Y., 440); *Beekman agt.*

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Gibbs (8 *Paige*, 511); *Atlantic Savings Bank* agt. *Hetterick* (3 *Hun*, 209); *Mutual Life Insurance Company* agt. *Salem* (3 *Hun*, 117); *Sleight* agt. *Reed* (9 *How.*, 278; *S. C.*, affirmed, 18 *Barb.*, 159); *Buchan* agt. *Sumner* (2 *Barb. Ch.*, 165); *Smith* agt. *Jackson* (2 *Edw.*, 28); *Halstead* agt. *Halstead* (55 *N. Y.*, 442); *Shafer* agt. *Reilly* (50 *N. Y.*, 61); *Bergen* agt. *Snedeker et al.* (21 *Alby. Law Journal*, 54).

A. Frank B. Chace, for respondent, cited *King* agt. *West* (10 *How.*, 333); *Husted* agt. *Dakin* (17 *Abb.*, 137); *Union Savings Bank* agt. *Osley* (4 *Hun*, 657); *Bush* agt. *Tilley* (49 *Barb.*, 599); *Cady* agt. *Patten* (55 *Barb.*, 466); *Seaman* agt. *Hogeboom* (3 *Barb.*, 215; *S. C.*, 21 *Barb.*, 404); *Dwight* agt. *Newell* (3 *N. Y.*, 185).

PER CURIAM.—Although there had previously been some doubt as to the powers of referees in proceedings to distribute surplus moneys, the decision in *Bergen* agt. *Snedeker et al* (21 *Alby. L. J.*, 54) has settled the matter. It is held, and wisely held in that case, that a question of fraud may be investigated before the referee; and it follows, by analogy, that every question may be examined tending to show the equities of the claimants. In the present case there is no doubt that the clause in question was inserted by accident and mistake. In an action for the purpose the mortgage would be reformed. There is no need of such an action to determine the rights as to these surplus moneys. They can be determined as well in the present proceeding. If the mortgage could be reformed as between mortgagor and mortgagee, then the liens of subsequent creditors would not prevent the reformation. Judgment creditors have no better rights than the judgment debtor in such respects, and, therefore, these judgment creditors are not entitled to resist the equity, which, in this case, appears in favor of the mortgagee.

The order of special term must be reversed and the exceptions to the referee's report overruled, and an order entered

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according to his report, with ten dollars costs and printing disbursements to the appellant against the respondents.

Decision of general term :

"Order reversed, with ten dollars costs and printing disbursements, and exceptions to referee's report overruled, with ten dollars costs. Report of referee confirmed."

SUPREME COURT.

THE PEOPLE *ex rel.* SIDNEY P. NICHOLS agt. EDWARD COOPER,
mayor, &c.

New York (city of) — Removal of police commissioner — Mayor's power judicial — his judgment upon question of removing police commissioner subject to review by supreme court on certiorari — Accused officer's right to know what the specific charges against him are — Charges if not admitted must be proved — Right to cross-examine witnesses — Right to be represented by counsel.

The mayor's power as to removal of a police commissioner is *judicial* and his judgment upon the question of removal is subject to review by this court on a *certiorari*; the accused official has a right to know what the specific charges against him are; such charges if not admitted must be proven, and the defendant should be permitted to cross-examine witnesses and to call witnesses in his own behalf, and in these and other respects to be represented by counsel.

If the return of the mayor to a writ of *certiorari* issued out of this court, to review his proceedings in making such removal, shows that in all or any of these particulars the relator in such proceeding was denied his rights, the mayor's proceedings must be reversed, and his decision declared to be null and void.

The return of the mayor to the writ of *certiorari*, in which is given all the proceedings had before him, on which a certificate of commissioner Nichols' removal from office was transmitted to the governor, is given in full in the opinion, and it is *held* :

That the relator did not have such a hearing before the mayor, as the twenty-fifth section of the charter entitled him to and, therefore, judgment should be rendered that the proceedings for the removal of the

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relator be in all respects reversed and set aside, and that the relator be reinstated in the office of police commissioner. (*See, also, the Matter of Sidney P. Nichols*, 57 How., 395 ; *The People ex rel. Nichols agt. Cooper*, *id.*, 463 ; *The People ex rel. Cooper, agt. Special Term at Chambers, id.*, 647 ; and *The People ex rel. The Mayor agt. Nichols, ante*. 300.)

Special Term, February, 1880.

John D. Townsend, for relator.

F. N. Bangs, for respondent.

LAWRENCE, J. — On the day on which this cause was argued before me the court of appeals, on the appeal taken by this relator from an order of the general term of this department granting a writ of prohibition against the special term, rendered a decision reversing the order of the general term. The opinion of the court of appeals was concurred in, as is stated, by all the judges of the court, and it must be followed as decisive of the law of this case. In that opinion the court say "the relator was the mayor of the city, and its charter conferred upon him power to remove the defendant, but *only for cause, and after an opportunity to be heard*" (*Session Laws of 1873, chap. 335, sec. 25*).

"The power is not an arbitrary one, to be exercised at pleasure, but only upon just and reasonable grounds, and then not until after notice to the person charged, for in no other way could he have an opportunity to be heard. The proceeding, therefore, must be instituted upon specific charges, sufficient in their nature to warrant removal, and these, unless admitted, be proven to be true. Defendant might also cross-examine the witnesses produced to support the charges, call others in his defense, *and in these and other respects be represented by counsel*. In no other way could the person sought to be removed have a due hearing or opportunity to be heard ; and this condition must be complied with before the power of removal is exercised." After citing the cases which sustain this position the court proceed to say : "It follows, therefore,

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that the proceeding is judicial in its character, and as a necessary consequence is subject to review by a writ of *certiorari* issued by the supreme court in the exercise of its superintending power over inferior tribunals and persons exercising judicial functions."

This definition of the power of the mayor, and of the nature of that power, will render it unnecessary for me to consider some of the questions which were so forcibly and thoroughly discussed by the learned counsel for the respective parties upon the hearing. The court of last resort has authoritatively declared that the mayor's power *is judicial*; that his judgment upon the question of removing a police commissioner is subject to review by this court on a *certiorari*, and that the accused official has the right to know what the specific charges against him are; that such charges, if not admitted, must be proven, and that the defendant should be permitted to cross-examine witnesses and to call witnesses in his own behalf, and in these and other respects to be represented by counsel. If the return of the mayor to the writ shows that in all or any of these particulars the relator in this proceeding was denied his rights it follows, necessarily, that the mayor's proceedings must be reversed and his decision declared to be null and void.

By the return of the mayor to the writ it appears that, on the 14th day of March, 1879, he addressed to the relator a written communication as follows:

"MAYOR'S OFFICE,
"NEW YORK, *March 14, 1879.* }

"To SIDNEY P. NICHOLS, *Police Commissioner of the City of New York*:

"SIR. — Under the board of police, of which you are a member, the government and discipline of the police force have become lax and incapable; the police force has deteriorated in efficiency, and it has become demoralized.

"The board of police, of which you are a member, has not caused the streets of the city to be thoroughly cleaned from

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time to time, and kept thoroughly cleaned, and has not removed from the city, daily, and as often as necessary, all ashes, dirt, rubbish and garbage.

"You have been negligent in the discharge of the public duties which you were bound to fulfill.

"You have allowed personal dissensions to preclude the proper exercise of the official trust which you assumed.

"Your conduct has been unbecoming your office.

"These causes warrant your removal from office.

"I will give you an opportunity to be heard thereon at twelve o'clock, noon, on Wednesday, March 19, 1879, at the mayor's office.

"EDWARD COOPER,

"Mayor."

It is also stated that, at the time and place appointed, the relator appeared in person and accompanied by counsel, and that thereupon the following conversation or discussion took place :

"MAYOR'S OFFICE,
"NEW YORK, *March 19, 1879.* }

"Mayor Cooper — I have addressed a letter to Gen. Smith, Mr. Erhardt and Mr. Nichols. Is Mr. Erhardt here? Gen. Smith is here, I see, and Mr. Nichols is here. Mr. Nichols, did you receive my letter of March 14?

Commissioner Nichols — I did, sir.

Mayor Cooper — I now give you an opportunity to be heard in response to it, if you have any thing to say.

Commissioner Nichols — I ask you, sir, in my case, whether I can be permitted to be heard by counsel, who are here, Messrs. Vanderpoel and Townsend?

Mayor Cooper — I will not hear counsel; any thing you have to say I will hear. I will state here to all the gentlemen that after the proceedings are over if they have any desire to submit any papers, in writing or in print, they can be put in, say within twenty-four hours, or at any time to-morrow.

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Commissioner Nichols — Will you permit me to speak through my counsel, Mr. Townsend, without argument?

Mayor Cooper — No.

Commissioner Nichols — If he acts as my agent only, will you permit him?

Mayor Cooper — No; but I will hear what you have to say.

Commissioner Nichols — What I have to state I have reduced to writing, and will read it, unless you will permit Mr. Townsend.

Mayor Cooper — I will not hear counsel read it.

Mr. Nichols — I protest against such action as being an outrage upon my rights in this court [reading]:

‘To the Honorable EDWARD COOPER, *Mayor of the City of New York*:

‘As one of the police commissioners of the city of New York, I appear in response to the communication from you, delivered to me on the fifteenth inst., citing me to appear before you on the 19th day of March, 1879, at 12 o'clock, noon — and in reference to the citation —

‘*First.* I respectfully protest that the charter of the city secures to me a right to be heard before it is adjudged that there is cause for my removal, and that this right has been violated, in that you, as mayor, by the terms of the notice served on me, have stated your conclusions, and adjudged that they warrant my removal from office before an opportunity has been accorded me of such hearing as is provided for in the charter.

‘*Second.* The paper or notice served upon me as containing charges against me, and being the only statement of charges received by me, is general, indefinite, and uncertain. It is impossible to understand from that paper, or notice, what specific acts or omissions are intended thereby. I therefore say, there is not given me a sufficient statement of charges, or matters alleged as cause for my removal, nor proper opportunity to hear the proofs, if any there may be thereon.

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‘*Third.* By further responding to said paper or notice, I do not intend to waive, but hereby expressly reserve the right to take and save all exceptions and objections to the uncertainty and insufficiency of said paper or notice as a statement of charges against me, and also to your honor’s want of jurisdiction in the matter, and I only further respond in order that your honor may be apprised of the fact that I fully deny each and every conclusion therein declared or intimated, and that this may be explicit. I deny that under the board of police, of which I am a member, the government and discipline of the police force have become lax and incapable, or that the police force has deteriorated in efficiency, or that it has become demoralized. I deny that the board has, or that I, as a member thereof, have failed or omitted to do or perform any duty imposed upon me or it, by law, in respect to cleaning the streets or removing from the city, ashes, dirt, rubbish or garbage. On the other hand, I affirm that at all times since I have been such commissioner, all the moneys taken from the public treasury or allowed for street cleaning purposes have been properly and faithfully applied to such purposes; and the board has at all times discharged its whole duty in the premises. I deny that I have been negligent in the discharge of the public duties which I was bound to fulfill. I deny that I have allowed personal dissensions to preclude the proper exercise of the official trust which I assumed. I deny that my conduct has been unbecoming my office. I deny that I have done any act or omitted any duty which would warrant or justify your honor in removing me from the office of police commissioner.

‘Respectfully submitted.

‘SIDNEY P. NICHOLS.’

“Mayor Cooper — Mr. Nichols, as I have been around the city a good deal, I have observed the condition of the streets myself. I am prepared to state to you a good many places in the city where the streets have not been cleaned as required

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by statute. Do you wish me to specify them to you — the particular places ?

Commissioner Nichols — Are you prepared to be cross-examined ?

Mayor Cooper — No, sir ; I ask you whether you wish to have specifications of particular streets and places from which the dirt and rubbish has not been removed, as required by statute ?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — You can be heard now, Mr. Nichols, if you like ; I wish to ask you whether you are acquainted with the condition of the following streets on March twelfth, and a week prior ?

Commissioner Nichols — I answer, if the mayor will furnish to me specifications of the charges that he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — I want an answer ; do you know the condition in which Greenwich street, from Murray street to the Battery, was on the twelfth of March ?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — Is that the only answer you have to make to my question ?

(No response.)

Mayor Cooper — I ask, have you any answer to make to my question ?

(No response.)

Mayor Cooper — Will you answer my question ?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges that he holds, if any, against me,

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and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — I have many other places that I am prepared to ask you about, for instance, I will ask you whether, merely as an illustration, and if you will answer this I shall ask you with respect to a good many others; I will take West Thirty-second street on the same date, are you acquainted with its condition?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges that he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — You decline to answer my question, I understand you, except as you have stated?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges that he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — Have you any thing else you wish to say in reply to my letter?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges that he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — If Mr. Nichols wishes to answer I am prepared to ask him questions in regard to the discharge of his duty, which will, I think, be sufficiently specific to give him an opportunity of answering specifically. I can ask you some questions now. Mr. Nichols, in 1877 were you informed by Mr. Erhardt, or by any reports that he caused to be furnished to the board of police or to the street cleaning bureau, that the men that were employed in the street cleaning bureau were idling away their time or inefficient?

(No response.)

Mayor Cooper — Have you any reply to make to my question, Mr. Nichols?

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(No response.)

Mayor Cooper — Mr. Nichols, if you are not prepared to answer you can hand your answer in, I do not wish to wait any longer; you can hand in any answer you wish to make.

Mr. Vanderpoel — It is all ready, I think; Mr. Townsend will look it over first.

(Mr. Vanderpoel hands to Mr. Townsend a paper on which he, Mr. Vanderpoel, has been writing, and after reading it Mr. Townsend hands it to commissioner Nichols.)

Commissioner Nichols — I would ask if that was for commissioner Erhardt's case or for my own?

Mayor Cooper — It is for your own case.

Commissioner Nichols [reading from the paper last referred to] — I am and have, at all times, been ready and willing to give the mayor full information upon every subject connected with the police department or its operations, but it is not proper for me, in a proceeding in which I am denied the right of counsel and have not been furnished with any charges or specifications, to make answers which would seem to recognize in any way the regularity of the proceedings against me.

Mayor Cooper — That is the only answer you have to make to the question?

(No response.)

Mayor Cooper — Mr. Nichols, if you have any information, or any thing to say in respect to the causes which I have stated here, I am prepared now to go into the matter with you in detail.

Commissioner Nichols — If the mayor will furnish to me specifications of the charges, if any, he holds against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — That is all you have to say now in reply to any questions that I may put to you; do you decline to give any other answer?

(No response.)

Mayor Cooper — Have you any thing else to say?

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Commissioner Nichols — I desire to be heard by counsel.

Mayor Cooper — I say now to Mr. Nichols, in regard to these charges, especially in regard to the street cleaning, of which,—he is the chairman of the committee which has special charge of it in the board of police, as I understand — if he has any thing to say at all in respect to either the fact that the streets have not been thoroughly cleaned, as required by statute, or any thing to say in explanation or excuse of its not being done so, I am prepared to hear it.

Commissioner Nichols — I am, and have at all times been ready and willing to give the mayor full information upon every subject connected with the police department or its operations, but it is improper for me in a proceeding in which I am denied the right of counsel, and have not been furnished with any charges or specifications, to make answers which would seem to recognize in any way the proceedings against me.

Mayor Cooper — Mr. Nichols, do I understand you to admit or deny the fact that the streets have not been thoroughly cleaned from time to time, and kept well cleaned as required by statute? I simply wish to know whether you admit or deny that statement.

Commissioner Nichols — I have set forth an answer to that in the paper which I have handed you. If the mayor will furnish to me specifications of the charges he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — Is that all the answer you make?

Commissioner Nichols — My answer to that last question is as follows contained in my letter to you: "I deny that the board has, or that I as a member thereof, have failed or omitted to do or perform any duty imposed upon me or it by law in respect to cleaning the streets or removing from the city ashes, dirt, rubbish or garbage. On the other hand, I affirm that at all times since I have been such commissioner all the moneys taken from the public treasury or allowed for street

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cleaning purposes have been properly and faithfully applied to such purposes, and the board has at all times discharged its whole duty in the premises."

Mayor Cooper — I understand you to say, then, that they have been properly cleaned, is that so ?

(No response.)

Mayor Cooper — Have you any answer to make to that question ?

(No response.)

Mayor Cooper — Have you any thing to say Mr. Nichols ?

(No response.)

Mayor Cooper — Does Mr. Nichols mean to answer my question, or not ?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — Is that the only answer ?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — Mr. Nichols, I don't wish to misunderstand your answer here, but I do not understand you to take any ground as to the fact whether the streets have been thoroughly cleaned as required by statute or not ; I wish a positive answer one way or the other.

Commissioner Nichols — I am, and have at all times, been ready and willing to give the mayor full information upon every subject connected with the police department or its operations, but it is improper for me, in a proceeding in which I am denied the right of counsel and have not been furnished with any charges or specifications, to make answers which would seem to recognize in any way the proceedings against me.

Mayor Cooper — Mr. Nichols, I know of my own know-

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ledge specific cases to which I will call your attention ; if, in respect to them, you desire to make any other answer, I will have it taken down ; I understand you decline to give me answers to the cases I present to you now ; I will begin again with the memorandum that I have of the places where I have been myself ; I will take Greenwich street, and Washington street below Morris street, and Mulberry street, and, in regard to them, do you claim that they have been properly cleaned ? I do not go over all that I have here ; that is merely an illustration ; I have very many other instances that I am prepared to state to you.

(Commissioner Nichols here consulted with his counsel.)

Mayor Cooper — I am waiting ; is Mr. Nichols preparing an answer ?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — That is the only answer you have to make, I understand ?

(No response.)

Mayor Cooper — Mr. Nichols, have you any thing that you wish to say further in regard to the matter of street cleaning as a reason why the streets have not been kept clean ?

Commissioner Nichols — If the mayor will furnish to me specifications of the charges he holds, if any, against me, and will allow me reasonable time to reply to the same, I desire to be heard.

Mayor Cooper — If Mr. Nichols desires to submit any views or any thing in writing I will receive it within the next twenty-four hours ; he may prepare it or have his counsel prepare it for him, or any other way he pleases ; has Mr. Nichols any thing more he wishes to say ?

Commissioner Nichols (after consultation with his counsel) — A letter from the Hon. Samuel J. Tilden.

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"ALBANY, EXECUTIVE CHAMBER, }
February 17, 1875. }

"To the Hon. WILLIAM H. WICKHAM, *Mayor* :

"Your messenger delivered to me the papers in the removal cases of February fourth" —

Mayor Cooper — Mr. Nichols, if you have any thing to say I will hear it ; if you have any thing written you may submit it.

Commissioner Nichols — This is in response.

Mayor Cooper — I will not hear any thing read. If it is submitted to me in writing or in print I will hear it. Have you any thing further you wish to say ?

(Commissioner Nichols again commenced to read the letter.)

Mr. Vanderpoel (to Mr. Nichols) — He says he will not hear any thing more.

Mayor Cooper — I will hear any thing you are pleased to say, or any thing in writing or in print you please to submit.

Commissioner Nichols — I desire to read this letter.

Mayor Cooper — Go on ; read it through, if you like.

(Commissioner Nichols here consults with his counsel.)

Commissioner Nichols — Instead of reading this, your honor, at present, after consultation with my counsel, I accept of your offer for the next twenty-four hours, to submit some papers. I will see what I will do, and submit any thing that I have.

Mayor Cooper — You have nothing more that you wish to say now ?

(No response.)

Mayor Cooper — I am waiting for an answer.

Commissioner Nichols — Not under the intimation that I have, that I cannot be heard by counsel.

Mayor Cooper — I understand Mr. Nichols has nothing more he wishes to say at present ; is that so ?

(No response.)

Mayor Cooper — I understand there is nothing more that Mr. Nichols wishes to say ; but he may hand in any paper he

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pleases in the course of the next twenty-four hours. The matter is closed as to Mr. Nichols."

From this it appears that although the relator was attended by his counsel, upon a direct request by him, that he should be permitted to speak through his counsel, Mr. Townsend, he was denied that right. The charges, too, which are contained in the communication of March 14, 1879, are of a general nature, and no *distinct specification* is made of the streets, which were not properly cleaned; of the particulars of the alleged negligence of the relator in the discharge of his duties; of the personal dissensions which precluded the relator from the proper exercise of the official trust which he had assumed; nor of the alleged conduct of the relator which was deemed by the mayor to be unbecoming the office of a police commissioner. The charges, even if they can be regarded as sufficiently specific, to warrant the mayor in making them the basis of a proceeding for the removal of the relator, should, in the language of the court of appeals in their opinion, "unless admitted, have *been proven to be true*." The charges were most emphatically denied by the relator, as is shown by the extracts from the return which are set forth above, and not a single witness was called in their support. The mayor did, it is true, after repeated requests on the part of the relator that he should be furnished with specifications of the charges against him, put this question to the relator: "Do you know the condition in which Greenwich street, from Murray street to the Battery was, on the twelfth of March?" and also stated, "I have many other places that I am prepared to ask you about, for instance, I will ask you whether, merely as an illustration, and if you answer this I will ask you with respect to a good many others, I will take West Thirty-second street, on the same date, are you acquainted with its condition?"

To these questions the relator replied: "If the mayor will furnish to me specifications of the charges that he holds, if any, against me, and will allow me a reasonable time to reply to the same, I desire to be heard." The relator not having

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admitted the charges was entitled to have them proven. It was not his duty to make an admission which would relieve the mayor from making that proof which the charter required.

He could not be compelled, by means of the interrogatories addressed to him, to shift the burden of proof so that instead of being proven to be guilty he would be obliged to prove his innocence. Again, the return shows that the mayor was acting either on his own knowledge of the condition of the streets, to which he referred, or on information which he had derived from other parties.

If he acted upon the information given to him by others, under the provisions of the charter as construed by the court of appeals, the relator was entitled to be confronted with his accusers and to cross-examine them, and if the mayor is to be regarded as acting on the statements which he made upon his own knowledge, he stood in the proceeding as a witness, and as such witness was subject to cross-examination.

To the distinct question put to him by the relator whether he was prepared to be cross-examined, the mayor replied in the negative.

Under this state of facts it is difficult to see how it can be claimed that the relator had an opportunity to be heard within the meaning of the provisions of the charter under which the proceedings for his removal were instituted.

It further appears by the return that, after the proceedings which took place on the 19th of March, 1879, and on the 3d of April, 1879, the mayor addressed a written communication to the relator, in which he stated that, before taking final action in the matter, he was willing, lest there may have been a misapprehension on the relator's part, to afford him a further opportunity for answer, explanation or excuse, and notified him that such opportunity would be given at the mayor's office, at 11 o'clock in the forenoon of Saturday, the fifth of April, and that he would also then receive from the relator any statement, explanation or argument in writing; but, that,

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in the absence of further answer or explanation upon the statement of the cause heretofore made by him to the relator, if the record should remain unchanged, the same with a certificate of the relator's removal from the office of police commissioner would be transmitted to the governor for his approval. It will be observed, from this communication, that the mayor had, on the proceedings already taken before him, determined to remove the relator. That proceeding afforded no ground for the relator's removal, for the reasons above stated, and yet, unless the relator could excuse himself, he was notified that, on the record thus made, if the record remained, unchanged a certificate of his removal from office would be transmitted to the governor.

This was again calling upon the relator to prove himself innocent of charges of which he had not been proven to be guilty, and, again, shifting the burden of proof from the accuser to the accused.

To this communication the relator replied, renewing all protests theretofore made, and distinctly inquiring whether :

First. "Will specifications of the charges of my removal be furnished me?"

Second. "Will witnesses be produced to sustain the causes of my removal, and shall I be permitted to be present when they testify and examine them?"

Third. "Will I be permitted to introduce evidence to refute the charges made against me?"

Fourth. "Shall I be allowed the assistance of counsel upon this hearing?"

Upon that day, no further proceedings having taken place before the mayor and so far as appears by the return, no answer having been made by the mayor to the relator's inquiries, the mayor transmitted a certificate of the relator's removal from office to the governor. I am of the opinion that this record so far from showing that the relator was afforded an opportunity of being heard, as provided by the charter, distinctly shows that such opportunity was denied to him, and

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unless, therefore, the writ should be dismissed or quashed for the reasons stated by the learned counsel for the mayor, judgment should be rendered that the proceedings be reversed.

One of the grounds taken by counsel on the argument was, that the writ recites no grievance capable of redress, inasmuch as the mayor's removal is initiate, inchoate and ineffectual without the approval of the governor.

Upon an examination of the points submitted by the mayor's counsel, on the argument of the appeal, in the prohibition case in the court of appeals, I find that the same proposition was there advanced, and as that court after argument held that the mayor's action was subject to review by *certiorari*, I must regard that point as having been decided in the present relator's favor. It was also contended by counsel, that after the mayor had transmitted the record to the governor, as a basis for the exercise of the latter's power of approval, the whole case was *res nova*, with the governor and that the presumption must be that the governor would commit no errors of his own, and would correct those of the mayor.

This point was in substance also taken before the court of appeals, and their decision that the mayor's action was subject to review by *certiorari*, is the answer to it. But it is argued that as the record had gone from the mayor to the governor, the court cannot, on *certiorari*, recall the physical act of the mayor in sending the papers to the governor, and the case of *The People agt. Reddy* (43 Barb. 539), among others, is cited as conclusive on this point. The opinion of the court of appeals in the prohibition case, is also an answer to this position. The point was taken and the case was cited in the court of appeals, and it must be concluded that the question was disposed of adversely to the respondent, for the reason that it cannot be assumed that the court would have held that the writ of *certiorari* should be heard, when it was apparent on the papers before the court, that such hearing must necessarily be of no avail, as the record, which it was sought by the writ to review, could not be brought before this court. Besides I

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can find nothing in the twenty-fifth section of the charter which requires the mayor to transmit to the governor the *record of the proceedings before him*. The charter provides that "the mayor shall in all cases communicate to the governor in writing his reasons for such removal." This does not call for a transmission of the original record to the governor, and if the proceedings before the mayor were not in accordance with the charter, his judgment, if erroneous, ought not to be allowed to stand, because he has put it out of his power to return the original record before him, particularly when, as in this case, he certifies that he has returned to the court that which he believes to be a true and correct transcript of the papers or record transmitted by him to the governor. Counsel also contended that the relator was guilty of *laches*, in not obtaining a writ of *certiorari* until August, 1879, being a period of four months after the date of his removal by the mayor and alleges that the court cannot, on this proceeding, go beyond the writ for the purpose of ascertaining that it was applied for as early as June, although not issued until August. Conceding that to be so, I am not prepared to hold that the lapse of four months between the date of his removal and the obtaining of the writ of *certiorari* would constitute *laches* on the part of the relator. Lastly, with the opinion of the court of appeals so often referred to before me, I cannot avoid the conclusion that the relator did not have such a hearing before the mayor, as the twenty-fifth section of the charter entitled him to, and, therefore, judgment should be rendered that the proceedings for the removal of the relator be in all respects reversed and set aside, and that the relator be reinstated in the office of police commissioner.

Judgment accordingly.

Wiggins *et al.* agt. Richmond *et al.*

SUPREME COURT.

NANCY WIGGINS *et al.* agt. WILLIAM L. RICHMOND *et al.*

Summons — the omission to put in the post-office address of plaintiffs' attorney &c., not a jurisdictional defect, but may be cured by amendment — Code of Civil Procedure, section 417.

In an action to foreclose a mortgage where the summons was accompanied by a notice of no personal claim, which was served upon the defendant H., whose name appeared in the *notice*, but not in the *summons*; the summons also failed to specify the office, post-office address or street number of the plaintiffs' attorney, and no reference thereto was made in the *notice*:

Held, that the words of section 417 of the Code of Civil Procedure were not mandatory, and that the omission was not a jurisdictional defect, but could be cured by amendment (*This is adverse to Osborn agt. McCloskey*, 55 How., 845).

Herkimer Special Term, June, 1879.

THIS was an action brought to foreclose a mortgage by the above-named plaintiffs and others against the defendants.

The summons, entitled as above, was accompanied by a notice of no personal claim, which was served upon the defendant, James M. Higby, whose name appeared in the *notice*, but not in the *summons*. The summons also failed to specify the office, post-office address or street number of the plaintiffs' attorney, and no reference thereto was made in the *notice*.

Defendant, James M. Higby, moved to set aside summons as irregular, the appearance indorsed on the papers being restricted to the motion only.

The motion came on to be heard before hon. JOSEPH MULLEN, at special term, in the village and county of Herkimer, on the 28th day of May, 1879.

Oswald P. Backus, for motion, raised the objection that the summons was irregular and void, in that it did not con-

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tain defendant, James M. Higby's name, nor did not specify the office, post-office address and street number of the plaintiffs' attorney, as required by section 417, Code Civil Procedure, nor did the notice annexed specify the office address of plaintiffs' attorney as required by Rule 2 of the supreme court; that the words of section 417 of the Code are mandatory, and that the omission was a jurisdictional defect and could not be cured by an amendment under section 728 of the Code of Civil Procedure, and cited *Osborn agt. McCloskey* (55 *How. Pr. Rep.*, 345).

John F. Wilson, in opposition to motion, claimed that the summons was regular and that the defect could be cured by amendment, and asked leave to amend.

MULLIN, J., held that the words of section 417 are not mandatory, and allowed plaintiffs to serve amended papers within twenty days.

SUPREME COURT.

CELIA STRAUSS and others agt. LEOPOLD HELLMAN and others.

Referees — their fees in partition.

Referees making sales in partition are to be allowed the same commissions prescribed by law for executors and administrators (*Laws of 1869, vol. 2, p. 1878, sec. 4*), viz.: For receiving and paying out all sums of money not exceeding \$1,000, at the rate of five dollars per cent; for receiving and paying out any sums exceeding \$1,000, and not amounting to \$10,000 at the rate of two dollars and fifty-cents per cent; for all sums above \$10,000 at the rate of one dollar per cent (*3 R. S. [6th ed.], 101, sec. 71*).

The commission is provided as a compensation for both receiving and paying out the money, and for that alone.

Where a referee, who was appointed to make a sale in partition, sold the property subject to certain mortgages, the purchase-money actually paid being \$7,650, while the mortgages, subject to which the property was sold, appear in the aggregate to have been \$16,500:

Strauss agt. Hellman.

Held, that he could only charge commissions on the amount actually paid ; he could not charge commissions for the amount of the mortgages subject to which the property was sold.

Special Term, March, 1880.

Michael J. Kelly, the referee, in person, for motion.

William Allan, Otto Hornitz and Joseph C. Wolf, for defendants, opposed.

DANIELS, J. — The referee who was appointed to make the sale in partition in this case, demands commissions for the amount of the mortgages subject to which the property was sold. The purchase-money actually paid was \$7,650, while the mortgages, subject to which the property was sold, appear in the aggregate to have been \$16,500. No part of this sum was either received or paid out by the referee, and the interest bound by these incumbrances was in no form sold by him. But that was substantially excepted from the interest which was sold by the sale being made subject to these incumbrances. It is not, by any means, plain, from the language of the statutes upon this subject, that any commissions on the amount really paid upon the sale could be lawfully charged by the referee. For, by the express terms of chapter 192 of the Laws of 1874, it was provided that sales of real estate under the judgment or decree of any court may be made in the city of New York by the sheriff or a referee appointed for that purpose by such judgment or decree. But when made by any other officer than the sheriff no greater sum shall be charged or allowed as fees than those prescribed by section 2 of the act amended by this chapter. The section here referred to is section 2 of chapter 569 of the Laws of 1869, and it contains no authority whatever for charging commissions. Before this amendment of 1874 the act of 1869 was held by the court of appeals to have been unconstitutionally enacted, and for that reason it was, without reservation or qualification,

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held to be void (*Gaskin agt. Meek*, 42 N. Y., 186). But it has since been held by this court that as section 4 was couched in general terms, although the act, by its title, seems to have related to sales made alone in the city of New York, that it did not fail with the residue of the act (*Daly agt. Jacob*, 2 Abb. New Cases, 97; *Richards agt. Richards*, 21 N. Y., Sup. Ct., 25), and under that conclusion fees by way of commissions are now allowed to referees for sales made under judgments in partition, in addition to the other fees prescribed for their services. Whether this is a sound construction or not of the law, is not now a point presented for decision. The doctrine of these cases will be followed, therefore, in determining the controversy now presented for decision.

But while they held that commissions might be charged, in neither of them was it held that the commissions could be calculated on the amount of incumbrances subject to which the sale should be made. In the first, the bids made included the amount of the mortgages, which were credited upon them in the final adjustment of the purchase-price; while in the other it does not appear that there was any incumbrance on the property beyond that under which the sale was made. Neither case, therefore, is an authority for the allowance of the claim now made. The distinction between this point and that held in *Daley agt. Jacob* (*supra*), is certainly quite attenuated, but, nevertheless, it does exist, for there the incumbered interest in the property was really sold, but in the present instance it was not. These allowances bear with extreme harshness upon the owners of real estate required to pass under the disposition of courts of justice and they ought not to be extended beyond the amount provided for by law. As that has now been construed to be in force, referees making sales in partition are allowed the same commissions prescribed by law for executors and administrators (*Vol. 2, Laws of 1869, p. 1378, sec. 4*). Those commissions are declared to be: For receiving and paying out all sums of money, not exceeding \$1,000, at the rate of five dollars per cent; for receiving and

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paying out any sums exceeding \$1,000, and not amounting to \$10,000, at the rate of two dollars and fifty cents per cent; for all sums above \$10,000 at the rate of one dollar per cent (3 R. S. [6th ed.], 101, sec. 71). By these provisions the commission is provided as a compensation for both receiving and paying out the money, and for that alone. In the case now under consideration no part of these mortgages was received by the referee. Neither was any part of them in any form paid out by him. He had nothing whatever to do with them beyond selling subject to them as incumbrances over which he had no authority whatsoever. For these reasons he has no right to the commissions now claimed by him and disputed by the parties whose property would be affected by their allowance, and an order to that effect will be entered in the case.

SUPREME COURT.

WILLIAM G. MILLIGAN, as administrator, &c., agt. WILLIAM H. ROBINSON and MOSES C. ROOF.

Costs — where there are two defendants — when entitled to separate bills of costs.

In an action against two defendants to set aside a sale made by one to the other on the ground of inadequacy of consideration, and that there was fraud in the sale, where the defendants appeared by separate attorneys and were successful, they are each entitled to tax *separate bills of costs*.

Fourth Department, General Term, January, 1880.

THIS was an action by the plaintiff to set aside the sale of three canal boats made by defendant Robinson, to defendant Roof. Plaintiff's intestate and defendant Robinson were the owners of the boats, and it was alleged that defendant Robinson sold to defendant for an inadequate consideration, and that there was fraud in the sale.

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The defendants succeeded and the referee ordered a dismissal of the complaint, with costs to defendants. The defendants appeared by separate attorneys and each taxed a separate bill of costs. An appeal was taken from such taxation by plaintiff, and judge Noxon, at Syracuse special term, December 9, 1879, granted the motion striking out defendants' costs, and only allowing one bill to both defendants, plaintiff citing section 1022, new Code. From these orders defendants appealed to general term at Syracuse, January 6, 1880, which reversed the orders of the special term and granted defendants separate bills of costs, defendants citing 29 *Howard*, 90.

P. H. McEvoy, for defendant Robinson.

G. W. Smith, for defendant, Roof.

C. J. Palmer, for plaintiff.

SUPREME COURT.

PRISCILLA ALLEN agt. GEORGE ALLEN.

Liberties of the jail — party confined for non-payment of alimony and counsel fee not entitled to.

In an action for divorce, where the defendant has been committed to jail for his failure and refusal to pay money to enable the plaintiff, who is his wife, to prosecute the action against him for divorce and for her support during its pendency, he is not entitled to the jail liberties.

The precept authorized by 8 Revised Statutes (6th ed., 839., sec. 4), is to be for the confinement of the delinquent in prison, which would not be executed by allowing him to go at large over the entire county, under a bond binding him not to transcend such limits.

Special Term, March, 1880.

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MOTION to give the defendant the liberties of the jail, where he is confined for non-payment of alimony and counsel fee.

E. T. Lovatt, for motion.

George F. Langbein, opposed.

DANIELS, *J.*—The defendant has been committed to jail for his failure and refusal to pay money to enable the plaintiff, who is his wife, to prosecute this action against him for divorce, and for her support during its pendency, and he has now applied for his discharge, by means of the writ of *habeas corpus*, from imprisonment under the commitment by giving the usual bond for the liberties of the jail. So far as the restraint imposed upon him is dependent on his refusal to pay the costs of the preliminary motion it cannot be sustained, for as the law now stands, there can be no imprisonment for the failure or refusal to pay such motion costs (*Code Civil Procedure*, sec. 15). But the fact that he cannot be lawfully imprisoned for that cause will not entitle him to be discharged without payment of the residue of the amounts ordered to be paid, provided, they constitute a legal and proper cause for his imprisonment (*The People agt. Jacobs*, 12 *N. Y. Sup. Court*, 428).

As to the costs of the proceedings to punish the defendant, and the amounts ordered to be paid for the temporary support of the wife, and the expenses of her action required to be defrayed, there is no such provision, neither is there any which, in terms or by reasonable implication, entitle him to the jail liberties on giving the usual bond to the sheriff who has him in custody. In one respect the provision on this subject was necessarily changed to render it conformable to the abrogation of that previously existing, allowing the benefit of the limits to persons arrested for the non-payment of interlocutory costs. Prior to that time a person arrested for failing to pay such costs was entitled to the liberties of the jail (3 *R. S.* [6 *ed.*],

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719, *sec.* 61). But since the right to arrest for the non-payment of such costs has been taken away, the provision declaring who may be entitled to the liberties of the jail has been correspondingly restricted, and that is now, in terms, limited to those who are in custody under orders of arrest, or by virtue of executions in civil actions, or in consequence of a surrender made by the party's bail (*Code Civil Procedure, sec.* 149). These are the only persons now declared to be entitled to the jail liberties, and each of the cases provided for is clearly distinguishable from that of a contempt for the non-payment of money, after which the defendant, in this instance, has been imprisoned.

In *The People agt. Bennett* (4 *Paige*, 282) the party had simply failed to pay interlocutory costs, and for that he was entitled to the liberties of the jail under the plain language of the statute as it was at that time in force; while in the present case he has been adjudged guilty of a contempt because of his failure to pay the moneys held to be necessary for his wife's support during the pendency of the action, and to enable her to vindicate her rights by its prosecution. As to those sums and the costs of the proceedings following his refusal to pay, the authority of the statute has been quite clearly expressed. For, after the amounts ordered to be paid had been demanded personally of the party, and that fact, together with his refusal to pay, have been shown by affidavit, then it has been declared that the court may issue a precept to commit the person so disobeying its order to prison until the sum with the costs of the proceeding shall have been paid (3 *R. S.* [6th *ed.*], 839, *sec.* 4). This is plain language, incapable of being misunderstood, which seems to fully justify so much of the order and commitment, under which the defendant is now restrained as provided for his close confinement until he shall pay such costs and these two sums of money. The precept authorized is to be for the confinement of the delinquent in prison, which would not be executed by allowing him to go at large over the entire county under a bond binding him

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not to transcend such limits. If the precept could be executed in that manner, its efficiency would be practically destroyed, and the summary remedy so clearly provided would be deprived of all the coercive power intended by the statute.

In *Ford* agt. *Ford* (41 *How.*, 169; 10 *Abb. N. S.*, 74), this subject was carefully examined and the same conclusion was adopted; but *Leslie* agt. *Leslie* (6 *Abb. N. S.*) considered entirely different subjects. It is needless, however, to examine authorities when the statute has been enacted in language so plain. It requires that the party disobeying the order shall be committed to prison, and when restrained for that cause no provision has been made entitling him to the liberties of the jail. The application for his discharge must accordingly be denied, with costs.

SUPREME COURT.

FRANCIS K. LEONARD *et al.* agt. LEONARD C. DAVENPORT, as surviving executor of the last will and testament of JAMES L. LEONARD, deceased, THE AMERICAN HOME MISSIONARY SOCIETY, THE BOARD OF HOME MISSIONS OF THE PRESBYTERIAN CHURCH IN THE UNITED STATES OF AMERICA.

Will—construction of—bequests to unincorporated societies—misnomer or misdescription of a legatee or devisee—parol evidence allowable to identify—Costs.

Where a clause in the testator's will read as follows: "Ninth, I give and bequeath to the American Bible Society, the American Board of Commissions of Foreign Missions and the Home Missionary Society, the sum of \$1,000 each:"

Held, 1st, that the Home Missionary Society, being an unincorporated society at the time of the making of the will and at the death of the testator, was not capable of taking the bequest in question:

Held, 2d, that the statutes of 1849, and any amendments thereof, relating to joint-stock associations and suits against them, does not aid the defendant (*Following McKeon* agt. *Kearney*, 57 *How.*, 850).

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A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision if, either from the will itself or evidence *abunde*, the object of the testator's bounty can be ascertained.

To identify a particular corporation as the one intended, where a name other than the corporate name is used, parol evidence is allowable to aid in determining the intention of the testator in the use of the words in the bequest.

In an action for the construction of a will the costs are in the discretion of the court.

Lewis Special Term, July, 1877.

Henry E. Turner, for plaintiff.

L. C. Davenport, in person.

Howard P. Wilds, for the American Home Missionary Society.

L. J. Dowin, for the Board of Home Missions of the Presbyterian Church of the United States of America.

HARDIN, *J.*—James L. Leonard died January 26, 1867, leaving a last will and testament. The defendant, L. C. Davenport, is the surviving executor of said will. The will was admitted to probate in the surrogate's court of Lewis county and letters testamentary issued to the executors named.

The controversy in this case arises over a clause in the will of Mr. Leonard, which reads as follows:

"Ninth. I give and bequeath to the American Bible Society, the American Board of Commissioners of Foreign Missions and the Home Missionary Society, the sum of one thousand dollars each."

The sum of \$1,000, given to the Home Missionary Society, is the subject of this action.

It is claimed by the plaintiffs, as residuary legatees; they insisting the bequest is indefinite and invalid, and the executor

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seems to favor that view, or to remain in doubt and neutral as to it until the questions in respect to it are settled by this court, and directions given for the payment of it and the interest accumulated thereon.

The other defendants, respectively, lay claim to it.

The defendant, the American Home Missionary Society, was not incorporated until February 6, 1871, when an act of the legislature was passed for such purpose.

Prior to that and for many years there was, and had been, a voluntary association of divers and sundry persons in the city of New York for missionary purposes and work, but not incorporated, under the style of the American Home Missionary Society.

The defendant, the Board of Home Missions of the Presbyterian Church in the United States of America, was incorporated, or the name changed of the corporation, by an act of the legislature, passed April 19, 1872, and claims to be the successors and assignees of all the property, rights and equities of the Presbyterian Committee of Home Missions which was incorporated by an act of April 18, 1862, chapter 340, page 548.

This society was the only incorporated one in existence at the making and publishing of the testator's will in 1867.

The learned counsel for the Home Missionary Society has submitted an ingenious and learned argument in its behalf; but I cannot assent to the conclusions thereof.

I am not at liberty to hold that an unincorporated society, at the time of the making of the will, or the death of the testator, was intended or was capable of taking the bequest in question; nor can I find any aid for the defendant in the statutes of 1849, and any amendments thereof relating to joint-stock associations and suits against them (*Laws of 1849, chap. 258*; *Laws of 1853, chap. 153, p. 283*; *Laws of 1854, chap. 245*; *Laws of 1867, chap. 280*; 1 *R. S.*, 599).

The question is passed upon in two cases which I must follow (*Buts agt. Buts*, 4 *Abbott's New Cases*, 317; *McKeon*

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agt. *Rearney*, 57 *How.*, 349 and the cases cited in the opinions in those cases).

Having reached the conclusion that the defendant, "The American Home Missionary Society," cannot take and have the bequest, it now becomes important to inquire whether the defendant, "The Board of Home Missions of the Presbyterian Church in the United States of America," was intended by the testator and was capable of and did take the bequest in question.

1st. Was the latter-named defendant intended?

2d. Is the misdescription such as to defeat any intention of the testator toward that society?

3d. Is the bequest void for indefiniteness in the language used by the testator in his will and, therefore, void?

In respect to the first question, the facts and circumstances surrounding the testator, his expressed views and intents must be considered (*Lefever agt. Lefever*, 59 *N. Y.*, 434), and it is allowable to take parol evidence to aid in determining the intention of the testator in the use of the words found in the bequest under consideration (3 *Bradford*, 144; 2 *Williams' Ex.*, 1037 and 1038; *Wigram* [2 *Am. ed.*, page 174], 104).

Therefore, the parol evidence offered at the trial must be received and considered; from such evidence it is apparent that the testator was an active, zealous and devout member of the Presbyterian church at Lowville; that he was in the habit of contributing liberally to the support of the church and the charitable societies fostered by it; that he knew of the Presbyterian Committee of Home Missions is inferable from the evidence received, as collections were taken in the church for its benefit at Lowville and the contributions were transmitted to the society in New York. In 1862 Dr. Stone was connected with the Board of Home Missions, as district secretary, and he was about the country presenting its claims in Presbyterian churches.

In August, 1862, he preached in the Lowville Presbyterian church and Mr. Leonard was among his auditors and heard

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the "missionary" sermon and, on the following Monday, the preacher and member had a conversation upon the subject of the discourse the day before. Mr. Leonard then spoke kindly of the effort and of the purposes of the society and assured the preacher that he could not then but would, subsequently, do some thing to aid the cause represented by the preacher.

After that conversation he made the will and had the bequest in question incorporated into it.

It is a reasonable inference from all the evidence and circumstances disclosed that the testator intended the legacy in the ninth clause of his will to pass to the society represented by Mr. Stone.

This view is fortified by the absence of any evidence to show any other corporation answering to the words, the Home Missionary Society (*Beasler* agt. *McCall's Devises*, 15 Conn., 273).

The views above expressed lead to the conclusion that defendant, "The Board of Home Missions of the Presbyterian Church of the United States of America," as the successor of the Presbyterian Board of Home Missions, formerly the Presbyterian Committee of Home Missions, is entitled to the bequest under consideration.

As in the case of *Lefever* agt. *Lefever* (2 T. & Cook, 330 and 59 N. Y., 434), this case is for the construction of the deceased's will and as it was held in that case that the costs were in the discretion of the court, so it must be held in this case (*See opinion of ALLEN, J.*, 59 N. Y., 447).

There must be a decree adjudging that the defendant, The Board of Home Missions of the Presbyterian Church of the United States of America, is entitled to the fund in the hands of the executor, to wit: \$1,000 with accumulations of interest thereon from February 13, 1868; after deducting therefrom the costs hereinafter allowed, viz.: The plaintiffs may have a clause in the decree awarding these taxable costs. (2) The defendant, The American Home Missionary Society, may have

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a clause awarding taxable costs and seventy-five dollars additional allowance, (3) and the executor may have a trial fee of thirty dollars and his taxable disbursements, and the defendant, The Board of Home Missions of the Presbyterian Church of the United States, will be required to pay out of said balance of said fund its taxable costs and seventy-five dollars additional allowance. Judgment is directed in accordance with the foregoing opinion, and either party may serve a copy of this opinion, with proposed findings, and the same and the decree may be settled by and before me upon ten days' notice after service of the copy of the opinion.

COURT OF APPEALS.

JOHN M. FRENCH, JR., appellant, agt. DANIEL W. POWERS,
respondent.

Time for serving a case on appeal. Code of Civil Procedure—sections 994, 997, 998.

Under the Code of Civil Procedure, as well as under the old Code, the party desiring to appeal has, at least, an equal time to serve the case which he has to frame the exceptions which it is to contain, and any court rule abridging this time is inconsistent with the Code and inoperate.

The service of a copy of a referee's report and notice of filing on the plaintiff's attorney does not operate to limit the plaintiff's time to serve a case or exceptions. The time does not begin to run until the entry of judgment and notice thereof, and the plaintiff has ten days thereafter within which to serve a case and exceptions.

February, 1880.

THE trial was before a referee who reported in favor of the respondent. The report was filed on the 30th day of July, 1875, and on the same day a copy of it was served on the

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other side, since which time no step had been taken in the action by either party until the 1st day of May, 1878, when the attorney for the appellant tendered a proposed case, which the attorney for the respondent refused to receive on the ground that the time had expired. No judgment has ever been entered in the action.

A motion was thereupon made at special term that the case be declared served or the attorney for the respondent be ordered to receive it, which was denied. On appeal to the general term, the order of the special term was affirmed.

George H. Munger, for appellant.

William H. Shepard, for respondent.

RAPALLO, J.— On the 30th day of July, 1875, when a copy of the referee's report and notice of its filing were served upon the plaintiff's attorneys, such service did not operate to limit the plaintiff's time to serve a case or exceptions. The time did not begin to run under the then existing law until the entry of judgment and notice thereof, and the plaintiff had ten days thereafter within which to serve a case and exceptions (*Code, sec. 268, 1851*). This section, as amended in 1851, provided that the service of the case should be made within ten days after notice of the judgment, or within such time as might be prescribed by the rules of the court, but this provision was construed by this court, in *Hunt agt. Bloomer* (13 N. Y., 341), to mean such further time as might be prescribed. As the exceptions were not required by the Code to be filed or served until after the entry of judgment, it could not have been intended that the court should prescribe an earlier time for the service of the case containing the exceptions than that prescribed by the statute for serving the exceptions themselves, though it might well be that a longer time would be required to prepare the case. *Johnson agt. Whitlock* (13 N. Y., 344) also recognizes that the case

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was not required to be served until after judgment. The court properly held, therefore, in the present case, that Rule 34 of the supreme court, which required a case to be served within ten days after written notice of the decision or report in a case tried before the court or a referee, was in conflict with the Code and, consequently, inoperative. The notice of the filing of the report, therefore, did not limit the time for serving either the case or the exceptions. The time did not begin to run before the entry of the judgment and notice thereof. But it is claimed, and was held at special term, that section 994 of the Code of Civil Procedure, which went into effect September 1, 1877, changed the practice in this respect and validated Rule 34, which made the time run from the service of the report and notice, and that, consequently, the notice in this case having been served before September 1, 1877, it became operative on that date by virtue of the new Code, and the rule, and the time, consequently, ran from the time the new Code went into effect and expired ten days thereafter. I do not think it quite clear that that result would follow, even if the new Code had changed the practice. It would be more reasonable to hold that, as the notice when served did operate to limit the time to serve a case, a new notice should be served under the new Code in order to obtain the effect which the new Code is supposed to give to such a notice, and that the new Code could not retract and give to a notice served in 1875 an effect and force which it did not then have. But it does not appear to us that section 994 of the new Code does change the former practice. It provides that exceptions taken after the trial may be taken at any time before the expiration of ten days after service of a copy of the decision of the court, or report of the referee, and a written notice of the entry of judgment thereupon. Although, under this section, exceptions may be taken at any time after the trial, they are not required to be taken until ten days after notice of judgment. The section further provides that if filed before the entry of judgment they shall be inserted in the judgment

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roll; if afterwards, they must be annexed to it. No provision is made in the new Code as to the time for serving the case. It must be made and settled as prescribed in the general rules of practice. This provision relates to the manner in which the case is to be made and settled, but within what time it is to be served it is not said. All that is clear upon this subject is that the case need not, and cannot, be made until after the exceptions have been framed, for it is expressly provided that the case must contain them (*sec.* 997). It is contended that the exceptions here referred to are only those taken on the trial, but the context does not justify this construction. On the contrary, the section provides that the case shall contain so much of the evidence and other proceedings upon the trial as is material to the questions to be raised thereby, and, also, the exceptions taken by the party making the case; and the same section provides for a subsequent separation of the exceptions from the case, and the next section (998) provides that it is not necessary to make a case where the party intends, on his appeal, to rely only upon exceptions taken as prescribed in section 994. As the party excepting has, under section 994, until the expiration of ten days after notice of the entry of judgment to take the exceptions, it is obvious that he cannot be put in default for not serving a case containing them, before the expiration of the time which the law allows him for framing them. The provisions are not explicit, but this much may be spelled out of them. They certainly are not sufficiently perspicuous to justify us in holding that they were intended to change the provisions of section 268 of the old Code or the interpretation which had been put upon them in *Hunt agt. Bloomer* and *Johnson agt. Whitlock*. There would be a manifest incongruity in requiring the case to be prepared and served before the exceptions. For the case, if properly made up, should contain only so much of the evidence as bears upon the questions raised by the exceptions, and until these are prepared and served the case cannot be properly settled. It should be

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shaped with reference to the exceptions, and to render the proceeding orderly, the exceptions should be served before or with the case. We think that, under the new as well as the old Code, the party desiring to appeal has, at least, an equal time to serve the case which he has to frame the exceptions which it is to contain, and that any court rule abridging this time is inconsistent with the Code and inoperative. As no judgment had been entered when the plaintiff attempted to serve his case and exceptions, we think he was in time and the service should have been accepted.

The orders of the special and general terms should be reversed, with costs, and the motion granted.

All concur.

SUPREME COURT.

THE PEOPLE *ex rel.* EDWARD COWLEY agt. PETER BOWE,
sheriff, &c., and JAMES FINN, warden, &c.

Habeas corpus — power of court to grant stay of proceedings and admit prisoner to bail — under what circumstances application to admit to bail should be entertained.

The provision of the *habeas corpus* act (2 R. S., p. 584, sec. 22 [Edmond's ed.]), excluding from its benefits persons committed or detained by virtue of the judgment or decree of a "competent tribunal," only applies where the tribunal had jurisdiction under some circumstances.

The prohibition contained in said act (2 R. S., 568, sec. 42), forbidding an inquiry upon return to the writ into "the legality and justice of any process, judgment, decree or execution," specified in the provision above referred to, does not take from the court or officer having jurisdiction of the writ the power, or relieve from the duty of determining whether the judgment or process emanated from a court of competent jurisdiction, and whether the court had the power to give the judgment or issue the process.

Where a writ of *habeas corpus* has been issued, under the provision of the nineteenth section of article 2 of title 6 of chapter 2 of part 4 of the Revised Statutes, there can be no doubt of the power of the court or offi-

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cer after issuing such writ in a proper case to grant a stay of proceedings, and, also, admit a prisoner to bail.

The application is addressed, however, to the sound discretion of the court. It is not the right of the prisoner, after conviction, to be let to bail, nor does the bare possibility that an error may have been committed entitle a prisoner to be bailed.

After indictment, trial and conviction, an application should be entertained to admit to bail only in cases of great question and difficulty.

Special Term, February, 1880.

Mr. Brooke, for relator.

Mr. Bell, assistant district attorney, for respondent.

LAWRENCE, J. — The relator is brought before me upon a writ of *habeas corpus*, and application is made that he be admitted to bail, pending an appeal taken by him on a writ of error from the judgment of the court of general sessions of the peace, in and by which it was ordered and adjudged that the relator, for the misdemeanor of which he had been convicted by the jury, should be imprisoned in the penitentiary of the city of New York, for the term of one year, and pay a fine of \$250, &c.

The indictment under which the relator was found guilty was framed under the fourth section of chapter 122 of the act of 1876, entitled "An act to prevent and punish wrongs to children."

The section reads as follows: "Whoever having the care or custody of any child shall willfully cause or permit the life of such child to be endangered, or the health of such child to be injured, or who shall willfully cause or permit such child to be placed in such a situation that its life may be endangered or its health shall be likely to be injured, shall be guilty of a misdemeanor."

The respondents return in answer to the writ, a transcript of the indictment and of the judgment of the court of general sessions showing the arraignment of the prisoner, his plea of

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not guilty, the joinder in issue, the trial before the recorder and a jury, the verdict of guilty by the jury and the judgment pronounced by the recorder.

The Revised Statutes declare that where, upon a return to a writ of *habeas corpus*, it shall appear that the party suing out the writ is detained in custody by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of any execution issued upon such judgment or decree, he shall not be entitled to prosecute the writ of *habeas corpus* (2 R. S., p. 584, sec. 22 [*Edmond's ed.*]).

And, again, by section 42 of article 2 of title 1 of chapter 9 of part 3 of the Revised Statutes it is provided: "But no court or officer on the return of any *habeas corpus* or *certiorari* issued under this article shall have power to inquire into the legality or justice of any process, judgment, decree or execution specified in the preceding twenty-second section" (Sec. 2, R. S., p. 589 [*Edmond's ed.*]).

The court of appeals, in *People ex rel. Tweed agt. Liscomb* (60 N. Y., 559), held that the prohibition contained in the above section does not take away from the court or officer having jurisdiction of the writ the power, or relieve from the duty of determining whether the judgment or process emanated from a court of competent jurisdiction, and whether the court had the power to give the judgment or issue the process. That jurisdiction of the person of the prisoner and of the subject-matter are not alone conclusive, but the jurisdiction of the court to render the *particular judgment* is a proper subject of inquiry, and while the court or officer cannot, upon return to the writ, go behind the judgment and inquire into alleged errors and irregularities preceding it, the question is presented, and must be determined, whether, upon the whole record, the judgment was warranted by law and was within the jurisdiction? Bearing in mind this exposition of the powers and duties of an officer before whom a writ of *habeas corpus* has been made returnable, I declined to dismiss this writ in the first instance, on the ground urged by the district attorney,

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that it appeared, on the face of the petition on which the writ was issued, that the relator was detained under the judgment of a competent tribunal of criminal jurisdiction, there being an averment, also, in the petition that such judgment was contrary to, and in violation of, law and held that it was not only my right but my duty to hear counsel and to examine the judgment and proceedings for the purpose of ascertaining whether the court had jurisdiction to render the judgment. An examination of the indictment, and of the subsequent proceedings down to and including the judgment pronounced by the recorder, fails to reveal either any want or excess of jurisdiction in the court of general sessions. The crime of which the relator was convicted is declared to be a misdemeanor and, as the statute of 1876 does not prescribe any particular mode of punishment or penalty therefor, it is properly punishable, under the general provision of the Revised Statutes, by imprisonment in a county jail, not exceeding one year, or by a fine, not exceeding \$250, or by both such fine and imprisonment (2 *R. S.*, p. 719, sec. 40 [*Edmond's ed.*]).

It is quite evident, therefore, that unless there are some other provisions of law which bear upon this case it is my duty to remand the prisoner (*See People agt. Neilson*, 16 *Hun*, 214; *People ex rel. Phelps agt. Oyer and Terminer*, 14 *Hun*, 21).

In this case a writ of error has been allowed, but no bill of exceptions has, as yet, been made up, in consequence of the inability of the stenographer, during the short time which has elapsed since the trial, to have his notes fully transcribed. Neither has a stay of proceedings been granted upon the writ of error.

By the nineteenth section of article 2 of title 6 of chapter 2 of part 4 of the Revised Statutes it is provided that: "If the offense charged in the indictment, for the removal of which such writ of error shall be allowed, be punishable by imprisonment in a state prison, or in a county jail, any officer

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herein authorized to allow such writ of error may allow a writ of *habeas corpus* to bring before him the defendant in such indictment, and may, thereupon, let him to bail upon a recognizance, with sufficient sureties, conditioned that such defendant shall appear in the supreme court to receive judgment on such writ of error, or in the court in which the trial on such indictment shall have been had, at such time and place as the supreme court shall direct, and that he will obey every order and judgment which the supreme court shall make in the premises" (2 *R. S.*, p. 765 [*Edmond's ed.*]).

It was under this provision, and not under the general act in relation to writs of *habeas corpus*, that the writ in this case was granted. And there can be no doubt of the power of the court or officer, after issuing such writ, in a proper case, to grant a stay of proceedings and, also, to admit a prisoner to bail. Such power has frequently been asserted and exercised (See *People agt. Folmsbee*, 60 *Barb.*, 481; *People agt. Lohman*, 2 *Barb.*, 450; *People agt. Restell*, 3 *How. Pr. Rep.*, 251; and, see note on *habeas corpus*, 3 *Hill*, 674 [47]).

The application is addressed, however, to the sound discretion of the court. It is not the right of the prisoner, after conviction, to be let to bail. HURLBUT, J., in the case of the *People agt. Lohman* (2 *Barb.*, 454), in commenting upon the power given, to let to bail, after conviction and sentence, well says: "On a question of bail, before indictment, the magistrate may inquire as to the guilt of the prisoner. After indictment he may, in cases not capital, look at the evidence upon which it was obtained. But at each step of the proceeding, the grounds upon which the prisoner can be let to bail, diminish as the evidences of his guilt increase, *because bail is not based on the grace or favor of the court, but solely on the doubt which may exist as to his guilt. After conviction and sentence his claims to be let to bail are further diminished; but, as he may still be innocent, as he may have something to urge against the legality of his sentence, he may apply to be bailed, and if it appear that his conviction was unjust, or*

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*there is a serious doubt of his guilt, his application may be granted. * * **

"But, at this stage of the proceeding, the legal doubts concerning the guilt of the prisoner, ought to be considered as so well settled against him, that the application for bail, if made to a judge at chambers, should be very cautiously entertained and only granted in cases of great question and difficulty."

Applying the rule so clearly stated by HURLBUT, J., I am of the opinion that this is not a case in which a justice of this court, sitting at chambers, should admit to bail. As there is no formal bill of exceptions before me, it is impossible for me to say whether, in the course of the protracted trial, some error may not have been committed, to the prejudice of the prisoner.

But the bare possibility that an error may have been committed does not entitle the prisoner to be bailed. After indictment, trial and conviction, as has been above shown, an application should be entertained to admit to bail only in cases "of great question and difficulty." The points which were made by the learned counsel for the relator in regard to the errors alleged to have been committed upon the trial, struck me as being rather of a technical than of a meritorious character, and the criticism upon the phraseology of the indictment, to the effect that it should have concluded against the form of the *statutes* instead of against the form of the *statute*, is too refined to be worthy of consideration on this application.

So, too, in respect to the objections to the charge of the recorder. I certainly am not prepared to say on the informal record before me that the recorder entirely misapprehended the statute under which the indictment was found, or that he did not fairly apply, or correctly appreciate, the precise force or meaning of the English authorities to which reference was made in his charge.

To conclude; the prisoner has, so far as can be discovered from the papers before me, had a perfectly fair and impartial

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trial, and after such trial has been sentenced to undergo the punishment prescribed by the law of the land. The court which tried him had complete and ample jurisdiction over his person and the subject-matter. No grave error or question of great difficulty or doubt is shown to have been committed, or to have arisen upon the trial, and every presumption is in favor of the justice and validity of the judgment.

It follows, therefore, that the writ must be dismissed and the prisoner remanded.

N. Y. COMMON PLEAS.

EDWARD A. BOYD, plaintiff and respondent, agt. BENJAMIN N. DISBROW, Jr., defendant and appellant.

Costs — on appeal to common pleas where judgment of district court is reversed.

The reversal, upon appeal by the common pleas general term, of a judgment rendered against a defendant by a district court of the city of New York for an amount of damages exceeding fifty dollars, entitles such defendant to ten dollars extra costs as part of the costs of the district court.

Ellert agt. Kelly (4 E. D. Smith) 12, explained.

Special Term, March, 1880.

PLAINTIFF sued, in the seventh district court, to recover \$185 on a *quantum meruit* for goods sold and delivered to defendant.

Defendant claimed that the goods delivered were not what he contracted for.

A trial was had before court and jury and a verdict rendered in favor of plaintiff for the amount claimed.

On appeal to the general term of the court of common pleas the judgment was reversed for error and thereupon defendant taxed his costs including therein ten dollars extra costs as part of the costs of the district court.

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From the allowance by the clerk on such taxation of the item for extra costs plaintiff appealed to the special term.

Thomas Kilvert, for appellant.

James Flynn, for respondent.

VAN HOESSEN, J. — The construction which has been placed upon the Code (*section 371*), occasions embarrassment to clerk and counsel. Not knowing any thing of the nature of the appeal, or of the reasons which led the general term to make its decision, the clerk cannot understandingly determine whether or not the party prevailing on the appeal ought to be allowed the extra costs provided for by *section 70* of the district court act. Take the case of *Moore agt. Gould* (*54 How. Pr.*, 500) as an example. There the clerk could see that a judgment in favor of the defendant had been reversed upon appeal, and that the sum claimed by the plaintiff in the district court exceeded fifty dollars; but there was no possible way by which he could have ascertained that the general term meant merely to decide that the plaintiff was entitled to recover upon a *quantum meruit*, and not for the sum which he claimed in the court below. It required the interposition of a judge who sat at the general term in that case to tax the costs. Had the court given effect to the words "costs incurred," I think the embarrassment might have been avoided. Then the party prevailing upon appeal would have been entitled, on the reversal of a judgment against him, to recover the costs which he had incurred, *i. e.*, run into, in the district court. If a judgment were affirmed the prevailing party would retain the extra costs awarded him by the district court; but if a judgment were reversed, the extra costs, which are never incurred, but which are in the nature of an extra allowance, would not be given to the party who had been unsuccessful in the district court.

Costs which are incurred are those expenditures which are necessarily made for fees and disbursements, and it was only

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those costs which the Code intended to award to the party who succeeded, on appeal, in obtaining a reversal of a judgment. But, it is too late, at this date, to adopt the construction which I think the proper one, for I am bound, by the practice of my predecessors, to hold that the defendant who succeeds in obtaining the reversal upon appeal of a judgment against him for an amount of damages exceeding fifty dollars, is entitled to ten dollars extra costs as part of the costs of the district court. It matters not that the general term does not and cannot render a final judgment in his favor. The rule which has been adopted gives to the defendant, against whom a judgment for more than fifty dollars damages has been rendered by a district court, the same extra costs where he obtains a reversal of the judgment on appeal (notwithstanding he is liable to a second action for the same cause) that would be awarded him if a decision had been rendered which was a final determination in his favor.

- When *Ellert agt. Kelly* (4 E. D. S., 12) was decided, it was supposed that this court would render a final judgment in favor of the party who ought to have succeeded in the district court. That view was long ago abandoned.

The taxation of the clerk must be affirmed.

SUPREME COURT.

WILLIAM H. BAKER, as receiver, &c., agt. JOHN C. VAN EPPS
and SARAH H. VAN EPPS.

Receiver — irregularity in employing an attorney of a judgment creditor — in motion to set aside summons and complaint for such irregularity all the defendants must join.

Although irregular for a receiver in supplementary proceedings to employ, on his behalf, the attorney for the judgment creditor in the action, yet where there are two or more defendants all must join in the application to set aside the summons and complaint for such irregularity.

Monroe Special Term, February, 1880.

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MOTION by defendant John C. Van Epps to set aside the summons and dismiss the action as to him, on the ground of irregularity, to wit : that the plaintiff's attorney in this action is and was the attorney of the judgment creditor, in the action and proceedings supplementary to execution therein, by which the plaintiff was appointed receiver of the property, &c., of John C. Van Epps.

The complaint herein alleges the plaintiff's appointment June 26, 1879, and qualification as receiver, &c., on proceedings supplementary to execution, upon a judgment for \$9,715.15, recorded March 10, 1879, by Abram W. Van Epps against John C. Van Van Epps; and alleges "that the said John C. Van Epps and his wife (codefendants), Sarah H. Van Epps, 'conspired together to prevent plaintiff from obtaining rents' of certain premises in Rochester, alleged to have been owned by said judgment debtor; and that by reason of such conspiracy and interference with plaintiff's rights as such receiver, the said Sarah H. Van Epps received certain rents, and that she, in the same way, had rented certain premises of said judgment debtor and owed therefor, and 'demands judgment for \$355 and interest, or for accounting, &c.'"

The defendant Sarah H. Van Epps duly answered. The other defendant, John C., without appearing in the action, makes this motion on the irregularity stated.

The motion is made upon the summons and complaint and affidavits, which allege in substance, upon information and belief, that no order of court was obtained instructing said plaintiff, receiver, to sue; that the attorney of record for the plaintiff here was the attorney for the judgment creditor in all the proceedings of said judgment, and is still acting as such attorney; that said attorney also has an assignment of said judgment, or part thereof, to himself, and has brought this action at his own prompting instead of that of plaintiff, receiver, and for the interest of himself; that the judgment on which supplementary proceedings were instituted has been appealed to general term, and the present action is brought

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to harass defendants therein and force a settlement. There was also an affidavit of merits by said John C. Van Epps.

On the argument plaintiff's attorney produced an order of court granting plaintiff, as such receiver, the right to bring this action.

Fanning & Williams, for motion.

(1.) The motion papers are in pursuance of *Branch agt. Harrington* (49 *How. Pr.*, 196). That case is decisive of this motion; see, also, cases therein cited.

(2.) The principle that an attorney for receiver (as the receiver acts for both debtor and creditor) should be untrammelled rests in public policy.

(3.) The attorney for receiver having, moreover, an assignment of the judgment is the real party in interest, and, hence, comes under the stringent rule.

(4.) The judgment debtor is the only one who can take advantage of the irregularity. It alone affects him. A third party cannot take advantage of it. Hence, his codefendant cannot join in the motion (*See Branch agt. Harrington, supra*; and *Commings agt. Egerton*, 9 *Bosworth*, 685).

Angus McDonald (Wm. E. Edwards, attorney), opposed.

(1.) *Branch agt. Harrington* (49 *How.*, 196) is a special term decision, and anomalous.

(2.) Both defendants should join in the motion. The action cannot be discontinued as to one because improperly brought, and continued as to the other because properly brought.

(3.) There is a distinction between receivers in equity and those in supplementary proceedings. The receiver is simply the agent of judgment creditors. The rule as applicable to present case is exploded (*Bostwick agt. Menk*, 40 *N. Y.*, 383; *Becker agt. Torrance*, 31 *N. Y.*, 641). A receiver in supplementary proceedings is nothing but an execution in equity (*Rule 85*.)

MACOMBER, J. — The motion to set aside the summons and complaint is denied, for the reason that all of the defendants did not join in the application. No costs allowed.

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SUPREME COURT.

THE PEOPLE *ex rel.* JACOB J. BANTA and JACOB J. BANTA,
respondents, agt. LOUIS KNEISSEL, appellant.

*New York (city of) — inspector of weights and measures — how appointed —
in what manner removed.*

Where, by chapter 49 of the Revised Ordinances of 1845 (*secs.* 1, 2), the city of New York had been divided into two inspection districts, and consequently there were but two such officers, *i. e.* (inspectors of weights and measures), one for the first and the other for the second district, and while the ordinance was in force the mayor nominated four persons together as such officers: •

Held, that although regularly and properly one person only should have been nominated for each of these offices and the persons should have been respectively named for the office to be received by them, yet the irregularity in the nomination was not such as to render it absolutely void.

The power of nomination existed to the extent of two officers, and the selection of four persons instead of two did not invalidate the exercise of it.

Where the nominations were acted upon separately by the board of aldermen and the case of the relator was first considered and disposed of by itself, confirming his nomination but without any designation of the district which should be given to him:

Held, that although the proceeding in this respect was not entirely regular, it was evidence of the assent and approval of the board that he should receive one of the vacant offices, and as the first would naturally be considered and filled in the first instance, it may be reasonably presumed that such was the intention and purpose of the board, and that rendered the relator's appointment as inspector for the first district effectual and lawful.

By section 25 of chapter 335 of the Laws of 1873, an inspector of weights and measures can only be lawfully removed by the mayor after affording him an opportunity to be heard, and after that the removal cannot take effect without the approval of the governor in writing.

First Department, General Term, October, 1876.

Before DAVIS, P, J., BRADY and DANIELS, JJ.

The People *ex rel.* Banta agt. Kneissel.

APPEAL from judgment recovered on the report of a referee.

John H. Strahan, for appellant.

L. S. Chatfield, for respondent.

DANIELS, J. — The referee held that the defendant had not been legally appointed to the office of inspector of weights and measures for the first district of the city of New York. Before the appointment of either of the relator or the defendant, the city had by ordinance been divided into two inspection districts (*chap. 49, Revised Ordinances of 1845, secs. 1, 2*). And while the ordinance was in force and on the 19th of May, 1873, the mayor nominated four persons together to the board of aldermen, as inspectors of weights and measures in the city of New York. At that time there were but two such officers in the city, one for the first and the other for the second district. Regularly and properly one person only should have been nominated for each of these offices, and the persons should have been respectively named for the office to be received by them. But the irregularity in the nomination was not such as to render it absolutely void. The power of nomination existed to the extent of two offices, and the selection of four persons instead of two did not invalidate the exercise of it. The fact that more were named than the mayor was empowered to select could be corrected and regulated by the action of the board having the power of confirmation. It was sufficient that the board was placed in the situation in which it could make the selection of the proper persons for the position by the act of the officer authorized to name the individuals. It was a substantial exercise of the mayor's authority because he named the persons who, in his judgment, would be proper incumbents of the offices. There was no such restriction imposed upon the act of nomination as rendered it void, because too many names were given for the places to be filled. And the greater number certainly included the entire nomin-

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ating power existing in the mayor to provide occupants for the offices (*Comrs. of Highways agt. Judges of Putnam Co., 7 Wend., 264*). In that case it was held that the concurrence of twenty, instead of twelve, freeholders, as to the necessity for laying out a highway did not render their action unlawful, although the statute had declared that it should be done by twelve.

When the nominations were made the candidates named were acted upon, separately, by the board of aldermen; and in their action the case of the relator was first considered and disposed of by itself. As to him their action was favorable. The board so far accepted the mayor's nominee, and concurred in his appointment. But that was done without any designation of the district which should be given to him. The proceeding, in this respect, was not entirely regular. But it was evidence of the assent and approval of the board that he should receive one of the vacant offices. And as the first would naturally be considered and filled in the first instance, it may be reasonably presumed that such was the intention and purpose of the board. That rendered the relator's appointment, as inspector for the first district, effectual and lawful (*People agt. Supervisors of Richmond Co., 20 N. Y., 252*). And it was not annulled by the circumstance that each of the other three persons who had been named by the mayor were afterwards acted upon and confirmed in the same manner. The relator accepted the appointment and entered on the discharge of the duties of the office. But while he held it the mayor became dissatisfied with his conduct and nominated the defendant for the same position, declaring the relator to have been removed. The board confirmed this nomination and the defendant thereupon took charge of the office and entered upon the execution of its duties. His right to do that depended upon the effect of the act of the mayor in his endeavor to remove the relator. And that, it seems to be conceded, must be determined by the provision contained in section 25 of chapter 335 of the Laws of 1873, if the

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appointment proved to be a legal one. That such was its character has been already shown. And the consequence is that the mayor's attempted removal of the relator was ineffectual; for by this section of the statute that could only be lawfully done by affording the relator an opportunity to be heard and, after that, the removal could not take effect without the approval of the governor, in writing, and that approval was not obtained in this case (*Laws of 1873, 491, sec. 25*).

As the case was proved and the facts found by the referee, the relator's appointment was lawfully made; and as he never was legally removed from the office, the defendant acquired no right to it by his nomination and confirmation.

The judgment appealed from should, therefore, be affirmed with costs.

SUPREME COURT.

THE PEOPLE *ex rel.* JACOB J. BANTA and the said JACOB J. BANTA agt. THEODORE S. KENT.

Appeal — Form of judgment from which appeal is taken — Report of referee and entry of judgment thereon — A simple confirmation of a referee's report not a final judgment.

In an action brought by The People on relation of B. and by said B., who unites therein against the defendant K., to determine the right of said K. to the office of inspector of weights and measures in the city of New York, the referee to whom the issues were referred found, among other conclusions, that neither B., the relator, nor K., the defendant, was lawfully entitled to said office; that the plaintiff, The People, were entitled to judgment against the right of the relator B. to hold said office and that he be ousted and removed therefrom, and he directed judgment to be entered accordingly; that the plaintiff, The People, were also entitled to judgment against the defendant K.; that he be ousted and removed from the office and for costs in this action, and he directed judgment to be entered accordingly. The relator excepted to the conclusions of law that neither he nor K. was lawfully entitled to the office, and to the conclusion that The People were entitled to judgment against him.

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The only judgment shown by the papers to have been entered is briefly as follows: That said K. was not duly and legally appointed to the office, and that he has intruded himself into said office and is exercising the duties thereof without lawful authority, and it is ordered and decreed that the report of said referee be, in all things, confirmed, and that the said K. be ousted and excluded from said office and that the plaintiffs recover of said defendant their costs. From this judgment B. appealed:

Held, that there is nothing in the judgment as it appears in the papers upon which B. can sustain his appeal. The judgment, as entered, instead of being one against him is in his favor, so far at least as a recovery of costs is concerned.

First Department, General Term, October, 1876.

Before DAVIS, P. J., BRADY and DANIELS, JJ.

APPEAL from judgment entered on report of referee.

L. S. Chatfield, for people.

F. A. Ransom, for relator.

DAVIS, P. J. — This action was brought by the people on the relation of Jacob J. Banta and by said Jacob J. Banta, who unites therein against the defendant Kent to determine the right of said Kent to the office of inspector of weights and measures in the city of New York. The complaint alleges that the plaintiff Banta is entitled to the office and its emoluments and fees.

Section 436 of the Code provides, that in every case judgment shall be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled, or only upon the right of the defendant, as justice shall require.

The answer of the defendant Kent alleged, in substance, that he was appointed to the office in question by the mayor and board of aldermen and duly commissioned on the 20th day of May, 1873, and immediately entered upon the duties of the office, and has ever since continued to perform them;

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that the relator was appointed on the same day, and was, in the month of August following, removed for misconduct in office and another person appointed in his place.

The issue was referred, and the referee upon the trial, after finding various facts touching the alleged appointment of the relator, the defendant and one Kneissel, as inspectors of weights and measures, found, amongst other conclusions, that neither Banta, the relator, nor Kent, the defendant, was lawfully entitled to the said office of inspector of weights and measures, and that each of them, without any right or legal authority, had intruded into and unlawfully held and exercised said office; that the plaintiffs, The People of the state of New York, were entitled to judgment against the right of the relator, Jacob J. Banta, to hold said office, and that he be ousted and removed therefrom, and he directed judgment to be entered accordingly; that the plaintiffs, The People of the state of New York, were also entitled to judgment against the defendant, Kent; that he be ousted and removed from the office, and for costs in this action; and he directed judgment to be entered accordingly. The relator excepted to the conclusions of law that neither he nor Kent was lawfully entitled to the office, and that each, without right, had intruded into and exercised said office, and to the conclusion that The People were entitled to judgment against him. The only judgment that the papers show to have been entered in the case is in this form:

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF JACOB J. BANTA AND THE SAID JACOB J. BANTA <i>against</i> THEODORE S. KENT.
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The hon. James C. Spencer, to whom the action above entitled was duly referred as sole referee to hear and determine the same, and said referee having sent hither his report wherein he finds that said Theodore S. Kent was not duly and

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legally appointed an inspector of weights and measures in and for the city of New York, or any district thereof, and that said Theodore S. Kent has intruded into said office, and is exercising and discharging the duties thereof without lawful right or authority. Now, it is adjudged, ordered and decreed that said report of said referee be in all things confirmed. And it is further ordered, adjudged and decreed that the said Theodore S. Kent be ousted and excluded from said office of inspector of weights and measures, and enjoined and prohibited from exercising the same under his alleged appointment, and that the above plaintiffs recover of said defendant their costs as adjusted, amounting to the sum of \$163.

From this judgment Banta appealed, and his notice states the appeal to be from the judgment entered against him, the said relator and plaintiff, Jacob J. Banta, upon the report of the referee, entered on the 12th of September, 1876, and from each and every part of said judgment.

The papers show no other judgment than that above recited, and that is a judgment against the defendant, Kent, alone.

It does not conform to the report of the referee and does not adjudge that Banta is not entitled to hold the office, and that he be ousted and removed therefrom; it recites no part of the report except that which relates to the defendant, Kent. After reciting that part which directs judgment against the title of Kent to the office, there is a general clause in the judgment which says :

“It is adjudged, ordered and decreed that said report of the referee be in all things confirmed.”

This must be held, we think, to relate to such parts of the report as are recited in the judgment, and is not sufficient to constitute it a judgment against the relator, Banta. A simple confirmation of a report is not a final judgment as contemplated by the Code. To treat it as such would introduce an extreme looseness of practice. Kent alone is the party aggrieved by the judgment entered, and the papers do not show any appeal on his behalf. We think there is nothing in

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the judgment as it appears in the papers before us upon which Banta can sustain his appeal. Perhaps another judgment affecting him has also been entered. If so, it should be made to appear, for the judgment now entered instead of being one against him is in his favor, so far at least as a recovery of costs is concerned.

This appeal should, therefore, be dismissed, without costs and with leave to Banta, if he shall so elect, to enter up judgment in the form directed by the referee, for the purpose of bringing before the court in proper form, the question intended to be raised on this appeal.

SUPREME COURT.

PETER DE WITT agt. ELIZABETH McDONALD.

Complaint — Demurrer — Sufficiency of complaint — Several causes of action arising upon contract may be joined — defect of parties.

Several causes of action, all arising upon contract, may be joined. That the second and third causes of action contained sufficient allegations to show breaches of the contracts therein disclosed is sufficient.

The words "fraudulently represented," or "with intent to deceive," or other words charging a wrongful intent are necessary to allege a tort. Where the complaint merely avers "her agent B. then represented to plaintiff;" and, "defendant entered into an agreement with plaintiff" it does not allege a tort.

The tort may be waived and the defendant may be sued upon contract. *Held*, that the tort in this case appears to have been waived.

Held, further, that there was no defect of parties defendant, as B. is averred to have been the defendant's agent.

Special Term, February, 1880.

DEMURRER.

The plaintiff complains and for a first cause of action alleges :

I. That at the city of New York, between the 15th day of March, 1879, and the seventh day of April following, the

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plaintiff, at the request and for the benefit of the defendant, performed work, labor and services reasonably worth the sum of \$100.

II. That defendant has neglected and refused and still neglects and refuses to pay the same or any part thereof though frequently requested so to do.

For a second cause of action the plaintiff alleges:

I. That from the 1st day of April, 1878, to the 7th day of April, 1879, plaintiff was in possession of a certain lot or parcel of land and premises, consisting of a frame building, and known as No. 799 Sixth avenue, in the city of New York, by virtue of a lease in writing demised to him by one William Amos, assignee of one Charles Smith, to whom said lease was assigned by one Harry M. Jones, who was the original lessee, having, on or about the 1st day of May, 1876, received a lease from the "Temple Bethel," a Jewish congregation and owners of the fee, said lease being for a period of five years from said date. That shortly thereafter said Jones erected the building or premises hereinbefore described.

II. That the defendant became the owner of the fee by purchase from the "Temple Bethel" aforesaid, on or about the 22d day of April, 1878, and claimed the ownership of said building as being part of the realty.

III. That at the city of New York, on or about the 24th day of March, 1879, the defendant, through her agent, one Stephen B. Bague, her attorney herein, entered into an agreement with plaintiff, which said agreement was partly oral and partly in writing, that if he would attorn and pay the rent due on the 1st day of March, 1879, to wit, the sum of forty-six dollars and seventy-five cents, being the balance of the rent for said month, she would indemnify him in the payment thereof so that he would not have to pay the same to said Amos, who was then threatening to eject plaintiff for the non-payment of the same; and that she further agreed, in consideration of said payment, that she would allow plaintiff to remain in the quiet and peaceable possession of said

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premises in accordance with the terms of the aforesaid lease from Amos, to wit, one year from the 1st day of April, 1878, at the monthly rent of sixty dollars, payable in advance, with the privilege of renewal during each and every year until the original term of five years mentioned in the aforesaid lease from the "Temple Bethel" to Jones should have expired, to wit, the 1st day of May, 1881, defendant to supply plaintiff with gas and fuel as in said lease from Amos to plaintiff provided, and in all respects ratifying and confirming the provisions of said last-mentioned lease. That shortly after, a dispute arising upon defendant's failure to supply gas and fuel as aforesaid, it was agreed that plaintiff should have said premises at a rent reduced sufficiently to indemnify plaintiff for the expense of supplying himself with said gas and fuel, the amount to be settled after the determination of certain litigation regarding said premises then pending, and that in case of a disagreement as to the amount thereof it was agreed that said rent should in no case exceed the rate he was then paying, to wit, the sum of sixty dollars per month.

IV. That shortly thereafter and about the 4th day of April, 1879, defendant commenced dispossession proceedings in the marine court of the city of New York against said Amos, who then occupied the northerly half of said premises; said Smith, the former lessee; said Jones, the original lessee; and one John C. Provost, who claimed to have purchased said building from said Jones, which building said Provost had threatened to tear down and take away; defendant, by her said agent Bague, then represented to plaintiff that it would be necessary to make him (plaintiff) a party defendant in such proceedings in order to give defendant a legal right to the possession of said premises and thereby enable her to confirm plaintiff in his rights under said lease, and that the warrant of dispossession, when obtained, would not be executed as to him.

V. That plaintiff, relying upon the representations above set forth, made no opposition to said dispossession proceed-

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ings; that said warrant was issued and executed, and deponent was ejected from said premises by order of said Brague, the aforesaid agent of defendant.

VI. That although plaintiff paid the rent for March, 1879, and was ready and willing at all times to perform all the conditions and obligations on his part, yet by reason of the breach, by defendant, of the contract hereinbefore set forth, plaintiff lost the value of said lease and all rights thereunder, and was subjected to great annoyance, vexation and inconvenience to his damage \$500.

For a third cause of action the plaintiff unites the first, second, third and fourth allegations of his second cause of action, and alleges:

I. That, at the city of New York, about the 15th of March, 1879, the defendant entered into an oral agreement with plaintiff, through said Brague, her said agent, that if he would allow her to use his (plaintiff's) name as sole plaintiff in a certain action in this honorable court, in which said Amos and Provost were defendants, brought for the purpose of restraining them from tearing down or taking away the premises aforesaid, she would pay all the costs and expenses, and indemnify him from all liabilities created or that might be created by the use of his said name, including the fees and compensation of the said Brague, her said agent and attorney. That on or about said 4th day of April, 1879, shortly after said Brague had obtained said warrant to dispossess plaintiff and the others above named, he ordered plaintiff to quit said premises forthwith. Whereupon plaintiff forbade said Brague from further using his (plaintiff's) name in said action, said Brague refusing to withdraw from or discontinue the case, or deliver the lease and other property of plaintiff to him, until he (plaintiff) should compensate said Brague for his services as the attorney of the plaintiff in said action.

II. That the plaintiff was thereby obliged to employ an attorney and counselor at law to enable him to discontinue said action and extricate himself from his liability for costs

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and damages to the aforesaid defendants each of whom appeared by a separate attorney and contested the action. That by reason of the premises plaintiff is indebted to an attorney and counselor at law in the sum of \$100, being the amount due said attorney for his services in the matters above set forth, and plaintiff has suffered great loss, annoyance and inconvenience by reason of the breach, by defendant, of the agreement above set forth, to his damage \$500.

Wherefore plaintiff demands judgment in the sum of \$1,100 besides the costs of this action.

The defendant demurs to the complaint of the plaintiff on the following grounds:

I. That causes of action have been improperly united, in that the first cause is on contract and the second and third causes of action are for fraud and a conspiracy.

II. Defendant demurs to the second and third causes of action on the ground that they do not state facts sufficient to constitute a cause of action.

III. Defendant demurs to the third cause of action on the ground that there is a defect of parties defendant, in that if the action is on contract the only breach alleged is by Stephen B. Brague who is not made a party defendant; if the cause of action alleged is for fraud and conspiracy he should have been made a party defendant.

F. K. Clark, for plaintiff.

I. The tort may be waived and the defendant sued upon contract (*Cushman* agt. *Jewell*, 7 *Hun*, 525; *Abbott* agt. *Blossom*, 66 *Barb.*, 353; *Westervelt* agt. *Jacquelin*, *Anth. N. P.*, 320; *Leach* agt. *Leach*, 25 *C.*, 657; *affd.*, 58 *N. Y.*, 630; *Hall* agt. *Robinson*, 2 *N. Y.*, 295; 1 *Add. Torts*, 44, note 1 [*D. & B. ed.*]). Even though the tort amount to a felony (*Benedict* agt. *Bk. of Comth.*, 4 *Daly*, 171).

II. The complaint discloses three causes of action, each of which are solely upon contract. (a.) The first cause of action

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is admitted so to be. (b.) As to the second and third causes of action the waiver of tort is expressly set forth. (c.) And it is impliedly waived by uniting them in the same complaint with an action conceded to be on contract. "But having inserted in the complaint a waiver of the tort he could not arrest the defendant upon an execution on the judgment" (*Cushman agt. Jewell*, 7 *Hun*, 530).

III. The words "fraudulently represented" or "with intent to deceive," or other words charging a wrongful intent, are necessary to allege a tort (*Ross agt. Mather*, 51 *N. Y.*, 108; *Hubbell agt. Meigs*, 50 *id.*, 480; *Meyer agt. Amidon*, 45 *id.*, 169; *Oberlander agt. Speiss*, *id.*, 175; *Chester agt. Comstock*, 40 *id.*, 1; *Marsh agt. Fulkner*, *id.*, 562; *Robinson agt. Flint*, 58 *Barb.*, 100; *Marshall agt. Gray*, 57 *id.*, 414; *Weed agt. Case*, 55 *id.*, 534; *Taylor agt. Scoville*, 54 *id.*, 34; *Livingston agt. Keech*, 34 *N. Y. Supr.*, 547; 2 *Add. Torts* [D. & B. *ed.*, '76], 1004). And the pleader must also show that he was influenced by the false representations (*Taylor agt. Guest*, 58 *N. Y.*, 262). None of these allegations exist in the case at bar, the complaint merely avers: "Her agent, Brague, then represented to plaintiff" and "defendant entered into an agreement with plaintiff."

IV. A complaint is not demurrable if it state facts which entitle the plaintiff to some relief, either legal or equitable (*Mackey agt. Auer*, 8 *Hun*, 180; *Richards agt. Edict*, 17 *Barb.*, 260; *Olerly agt. Brown*, 51 *How. Pr.*, 93). A complaint is not demurrable because it does not demand all the relief to which the plaintiff may be entitled (*Buess agt. Koch*, 10 *Hun*, 299).

V. The defendant cannot demur to the prayer for relief (*Mackey agt. Auer*, 8 *Hun*, 180; *Garner agt. Thorn*, 56 *How. Pr.*, 452; *Stewart agt. Hutchinsonson*, 29 *id.*, 181; *Atwill agt. Le Roy*, 15 *id.*, 227; *Meyer agt. Van Collem*, 28 *Barb.*, 330; *Woodgate agt. Fleet*, 9 *Abb. Pr.*, 222; *Moses agt. Walker*, 2 *Hill*, 536). The plaintiff may sue (*ex contractu*)

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generally for damages, though the amount be expressed in the contract.

VI. The allegations in the second and third causes of action which, if considered separately might be deemed to sound in tort, consist of matter of inducement necessary to give the jury an intelligent understanding of the peculiar circumstances out of which the cause of action accrued.

VII. If the position last above taken is erroneous, then the allegations are mere surplusage and not demurrable. (a.) "The imperfect averment of a material fact is not cause for demurrer. If the intention of the pleader is apparent, but the phraseology doubtful in effect, the remedy is by motion, and not by demurrer" (*Moffatt agt. McLaughlin*, 6 *Weekly Dig.*, 293; *S. C.*, 13 *Hun*, 449; *Garrett agt. Lawrence*, 59 *N. Y.*, 192; *Bostwick agt. Dry Goods Bank*, 67 *Barb.*, 449). (b.) If the complaint state a good cause of action, though inartificially expressed, a demurrer will be deemed frivolous (*Lynch agt. Levy*, 11 *Hun*, 145; *People agt. New York*, 8 *Abb. Pr.*, 7). (c.) Charging the defendant's act as a wrongful one does not convert it into a tort (*Bruce agt. Hobby*, 5 *N. Y. Leg. Obs.*, 18).

VIII. A demurrer will not lie for mere verbiage or surplusage as: (a.) Irrelevancy (*Smith agt. Greenin*, 2 *Sand.*, 702; *Watson agt. Husson*, 1 *Duer*, 242; affirmed 14 *N. Y.*, 60). (b.) Redundancy (*Ward agt. Ward*, 5 *Abb. [N. S.]*, 145; *Bishop agt. Edmiston*, 16 *Abb.*, 466; *Luddington agt. Slawson*, 6 *J. & Sp.*, 81). (c.) Uncertainty (*Spies agt. Acces. Trans. Co.*, 5 *Duer*, 662; *Seeley agt. Engell*, 13 *N. Y.*, 542; *Roeder agt. Ormsby*, 22 *How.*, 270). (d.) Argumentativeness (*Brown agt. Richardson*, 20 *N. Y.*, 472; *Prindle agt. Caruthers*, 15 *id.*, 425; *Zabriskie agt. Smith*, 13 *id.*, 322). (e.) Defect of form (*Howell agt. Fraser*, 1 *C. R.*, 270; *S. C.*, 6 *How. Pr.*, 221). (f.) Duplicity (*Gooding agt. McAlister* 9 *How. Pr.*, 123; *Wells agt. Webster*, *id.*, 251). (g.) Because hypothetical (*Taylor agt. Richards*, 9 *Bosw.*, 679; *Ketchum agt. Zerega*, 1 *E. D. Sm.*, 553).

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IX. To make a pleading more definite and certain the remedy is by motion only (*Code, sec. 546; Warren agt. Phillips, 30 Barb., 647; Meyer agt. Van Collerin, 28 id., 280; Chesebrough agt. N. Y. and E. R. R., 26 id., 9; Hammond agt. Hudson R., &c., 20 id., 378; Richards agt. Edict, 17 id., 260; Lee Bank agt. Kitching, 11 Abb., 435; Graham agt. Camman, 5 Duer, 697*).

X. The allegations of the complaint are sufficient to constitute a (3d) cause of action (1 *Add. Torts [Dud. & Bay. ed., '76], 10*). In *Webb agt. Portland Manufacturing Co.* (3 *Sumner, 189*), STORY J., said: "I can very well understand that no action lies in a case where there is *damnum absque injuria*; that is, where there is a damage done without any wrong or violation of any right of the plaintiff; but I am not able to understand how it can be correctly said, in a legal sense, that an action will not lie, even in a case of wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that wherever there is a wrong there is a remedy to redress it, and that every injury imports damages in the nature of it, and if no other damage is established, the party injured is entitled to a verdict for nominal damages." "It is impossible to imagine any such thing as *injuria sine damno*. Every injury imports damage, in the nature of it" (*Lord Holt, see 3 Pars. Contr. [6th ed.] and cases there cited*). "A complaint is not defective in substance for omitting to state conclusions which are to be implied from other facts sufficiently stated" (*Case agt. Carroll, 35 N. Y., 385*). The intention is to treat Brague, wherever spoken of, as the agent of defendant.

XI. The demurrer is defective. (a.) Inconsistent. In that in the first paragraph thereof the third cause of action is treated as sounding in tort, and in the third paragraph it treats the same cause of action capable of being on contract.

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(b.) Duplex. It assumes an alternative, "if it is on contract the only breach is by Brague; if for a fraud and conspiracy he should have been made a party." It should assert one or the other. If he could not ascertain which was intended, he should have moved to make more definite and certain.

(c.) Frivolous. There is nothing on the face of the complaint, express or implied, that warrants the assertion, "if the action is on contract the only breach alleged is by Brague. Plaintiff should have judgment absolute with costs."

VAN VORST, J.—The defendant supposes that the plaintiff in and by his second and third causes of action is proceeding to recover damages arising from "fraud and conspiracy." I do not so understand these portions of the complaint. The plaintiff seeks to recover for breaches of contract which these causes of action set up. The tort appears to have been waived.

The causes of action all arising on contract may be joined.

I think that the second and third causes of action contain sufficient allegations to show breaches of the contracts therein disclosed. That is sufficient.

There is no defect of parties defendant; Brague is averred to have been the defendant's agent.

There should be judgment for the plaintiff on the demurrer, with liberty to the defendant to answer on payment of costs.

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COURT OF APPEALS.

MARY E. SACIA, respondent, agt. NEAL W. O'CONNOR,
appellant.

*Ejectment — when and under what circumstances motion for a new trial
should be denied.*

Where, on a motion for a new trial in an action of ejectment, the papers show that the motion is made on behalf of a party whose interest in the premises is at least doubtful, on a case where consent has been given to the judgment, such motion being made by an attorney who is not shown to have had any authority, and where it is very uncertain upon the papers what are the actual facts, and whether a case is made out for a new trial within the statute (2 R. S., 309, as amended by chapter 485, Laws of 1862), the motion should be denied.

If the taking of judgment by consent was a default, the defendant should make his motion under section 38, and satisfy the court by affidavit that the ends of justice would be promoted, and the rights of the parties "more satisfactorily ascertained and established."

January, 1880.

THIS is an appeal from an order of the general term of the superior court of the city of New York, affirming an order, made at special term, denying what purports to be defendant's application for a new trial of an action of ejectment under the statute.

The plaintiff commenced this action in May, 1876, against the defendant, Neal W. O'Connor. John Townshend was her attorney in this action. O'Connor alone interposed an answer to the complaint. Charles L. Halberstadt was the attorney for O'Connor. On the 22d day of June, 1877, O'Connor consented to the entry of judgment against him in open court. The case was never, therefore, actually tried. Judgment was entered against O'Connor, in favor of the respondent, for \$224.74 costs, and her attorney issued an execution on this judgment against O'Connor. Garrett J. Byrne claimed to be

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the landlord of the defendant, O'Connor, as the affidavit of Mr. Roe states. On this execution against O'Connor, issued on plaintiff's own judgment, the sheriff was directed by plaintiff's own attorney to sell the interest of Garrett J. Byrne in the plaintiff's property. That interest, so far as the papers show, was a claim that he was the landlord. This Josiah Lockwood purchased Garrett J. Byrne's interest in plaintiff's property. Plaintiff's own property was, therefore, sold out on her own judgment by her own attorney, and purchased by this mysterious Lockwood, who now seeks to question her title. On the 14th of January, 1878, plaintiff sold and conveyed the premises in question to Mary L. Sacia, who now owns it. It will, therefore, be seen that the plaintiff has no interest in the action. Neal W. O'Connor and Garrett J. Byrne, the landlord of O'Connor, has no interest in it, and that neither of them make any affidavit in the motion, and no authority is shown authorizing Mr. Roe to appear for either of them. On the 24th of May, 1879, as soon after the entry of the judgment in plaintiff's favor, for \$224.74 costs, as it was possible to perfect title, the silent but diligent and unseen Lockwood, who makes no affidavit in this proceeding, served notice of motion, founded on the affidavit of Mr. Roe alone, and served it on John Townshend. On the 24th of May, 1879, Mr. Townshend wrote plaintiff a letter, in which he instructs her to procure another attorney. He says: "I wish you to distinctly understand that I am no longer your attorney. I shall not oppose the motion." Mr. Roe signs the notice of motion as "defendant's attorney and attorney for Josiah Lockwood." In that notice of motion he asks that Lockwood be made a defendant and that a new trial be had on payment by the defendant to the plaintiff, "or her attorney of record," of costs.

A. J. Roe (N. C. Moak of counsel), for appellant.

I. It was claimed below at general term that the motion should have been made by the defendant's attorney of record.

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It is clear, however, that after judgment a party may change his attorney without any consent or order (*Weeks' Law of Attorney*, 427, 436; *Thorp agt. Fowler*, 5 *Cow.*, 446; *Trust agt. Repoor*, 15 *How. Pr.*, 570).

II. Where the prescribed facts are shown to exist, the provisions of law leave no discretion in the court either to deny the motion, or to impose terms other than those prescribed by the statute (*Rogers agt. Wing*, 5 *How. Pr.*, 50; *Shaw agt. McMarin*, 2 *Hill*, 417).

III. In this case, all the prescribed facts were shown. It was shown: (1.) The action was ejectment. (2.) The motion was by the defendant. (3.) The motion was within three years after judgment on a verdict.

Ira D. Warren, for respondent.

I. All the interest Garrett J. Byrne had in this property, at the time of the commencement of this action, in 1876, as appears by Roe's affidavit, was this: At the time of the commencement of the action it was claimed that the defendant was in possession as tenant of Garrett J. Byrne. It does not appear that Byrne ever claimed to own the property, or had the slightest interest in it. Whether O'Connor made this claim or a street gamin does not appear. The affidavit says "it was claimed," but it don't state by whom, or that there was any foundation for the claim. Now, if Lockwood had any interest in it, or any right to come into this case, it was through the purchase of this vague "claim to be landlord" under a sale on an execution against O'Connor, on a judgment owned by plaintiff, on an execution issued by her own attorney. Did this purchase make Lockwood the "heir and assign" of the defendant, Neal W. O'Connor? Could a "claim to be landlord" be sold on an execution unless some fact appears to show that the "claim" had some foundation? If he "claimed to be landlord" in May, 1876, did such claim continue until June, 1877, when the judgment was rendered?

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Is not the position of Lockwood a glittering generality? Again: O'Connor's attorney in this case is Mr. Halberstadt. Mr. Roe has never been substituted. O'Connor makes no affidavit and, for any thing that appears, knows nothing about this application. The statute provides that the court may, upon application of "the party against whom the same was rendered, his heirs or assigns," vacate the judgment, &c. Before the court will put a plaintiff to the expense of a new trial, must it not appear that the application was made by "the party," O'Connor, either by its appearing that it is made by his attorney of record in the case, or some reason given why it was not, or on an affidavit of O'Connor. Can a strange attorney come in and make such an application when he pleases, on his own affidavit, without even swearing that he acts for "the party," without any affidavit of the party or any thing showing authority to act for "the party?" We think not and the court are right in saying, as they do, that the matter is in a "vague and obscure state."

II. The fact is undisputed here that when the case was ready for trial the defendant Neal W. O'Connor "consented" to judgment in open court. Section 36 provides that "every judgment in the action of ejectment rendered upon the verdict of a jury, or upon the decision of a single judge, upon the facts, the court shall vacate," etc. We submit that a judgment rendered, not on the verdict of a jury on the facts, but by consent of the party, in open court, does not come within the statute entitling a party absolutely to a new trial (*Chautauque County Bank agt. White*, 23 N. Y., 348; *Large agt. Ropha*, 1 Duer, 701). The party is bound by his consent, and estopped from taking advantage of a statute to indirectly get rid of his consent. There was no "verdict of a jury upon the facts," it was a consent which O'Connor is bound by until he shows some reason to set it aside, which perhaps he might do under section 38.

III. The most that could be said on the part of the defendant is, that a verdict or judgment taken by consent was a

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default (*Bennet agt. Couchman*, 48 Barb., 74). If it was a default, section 38 provides for opening the default, if the "court is satisfied that the ends of justice will be promoted."

IV. Leave to renew this motion being given, it is not appealable (*Robbins agt. Ferris*, 5 Hun, 286). When leave to renew is given, it is not a final order within the meaning of section 190 of the Code (*King agt. Platt*, 2 Abb. Ct. App. Cas., 527). Had Mr. Townshend and Mr. Roe availed themselves of this leave to renew, they could have made it clear. 1st. By what authority Mr. Roe undertakes to represent O'Connor, whose attorney he is not. 2d. What the "claim" of Byrne to be landlord is founded on. 3d. What Josiah Lockwood got by his purchase of Byrne's claim to be landlord, under the plaintiff's execution against O'Connor. 4th. Who undertook to sell the plaintiff out on a judgment which she owed without her knowledge. 5th. How it happened that Lockwood could purchase her own property, on her own execution, issued by her own attorney, on her own judgment, and pay nothing for it. 6th. Why it is that neither O'Connor nor Byrne, nor Lockwood, the three pretended claimants, make affidavit on this motion? 7th. Whether or not, although the hand is the hand of Jacob, the voice is not the voice of Esau. 8th. How the ends of justice would be promoted by allowing Lockwood & Co. to repudiate the defendant's consent, and thus enable them to gravitate towards this little piece of land, and finally capture it, on Lockwood's shadowy title, or, at all events, subject the owner to an expensive litigation.

PER CURIAM.—We think that the papers upon which the application for a new trial in this action is founded, do not establish facts which authorize the granting of the motion.

The application is made on the behalf of the defendant and of one Josiah Lockwood. The interest of Lockwood is stated to have been derived from one Byrnes, who, it is alleged, was the landlord of the premises under whom the defendant

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was in possession. The right of Lockwood is expressly controverted by the opposing affidavit, and it is alleged that Lockwood has no lawful title or claim, and that he is neither heir or assignee of the defendant nor of Byrne.

It is also shown by the affidavit that when the action was ready for trial the defendant withdrew his answer, and judgment was entered by his consent in open court. It is true the judgment record shows that by the direction of the court a verdict was found for the plaintiff. But without contradicting the record, it may be assumed from the affidavit, which is not controverted, that this was done by consent.

It also appears that the application is not made by the attorney of record, but by an attorney who has never been substituted in the place of the original attorney. The motion, then, is on behalf of a party whose interest in the premises is at least doubtful, in a case where consent has been given to the judgment, and by an attorney who is not shown to have had any authority. To say the least it is very uncertain upon the papers what are the actual facts, and whether a case is made out for a new trial, within the statute, (2 R. S., 309, *as amended by chap. 485, of the Laws of 1862*).

The defendant, or the party actually interested, had an opportunity to supply these defects by a renewal of the motion, as was authorized by the special term. This he has failed to do, and we think the order should be affirmed, with costs.

All concur, except FOLGER and RAPALLO, JJ., absent.

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SUPREME COURT.

WILLIAM A. HAMMOND agt. WILLIAM P. EARLE and another.

Defense — Allegation of want of sufficient and adequate consideration — Averment that contract is inoperative and void for want of — legal conclusion — Each of several separate answers must be regarded as if it stood alone — The rule of pleading recognized in such cases — Defense that plaintiff is not real party in interest is not available unless supported by facts pleaded like any other defense — Defense of recoupment available, if facts support it, whether pleaded for that purpose or otherwise.

An allegation in an answer "that the contract set forth in said complaint is inoperative and void for want of a sufficient and adequate consideration therefor," is an allegation of a conclusion of law. It is necessary to aver the facts which would show that there was no sufficient and adequate consideration.

Each answer must, of itself, be a complete answer to the whole complaint, as perfectly so as if it stood alone. Unless, in terms, it adopts or refers to the matter contained in some other answer, it must be tested as a pleading alone by the matter itself contains. If it is not complete, in and of itself, it is insufficient in law and cannot be sustained by reference to the other defenses contained in the answer.

A defense that the plaintiff is not the real party in interest, is not available unless supported by facts pleaded like any other defense.

The defense of recoupment is available, if facts support it, whether pleaded for that purpose or otherwise. If the allegations in respect to that defense are not sufficiently definite and certain to enable the plaintiff to understand them, or to raise a clear and precise issue, the remedy by the plaintiff is by motion to make more definite and certain.

Where the facts alleged in the answer are sufficient to entitle the defendant to a recoupment of his damages, even if they are obscurely or vaguely set forth, the answer is not, for that reason, demurrable.

Special Term, January, 1880.

DEMURREES to answers.

The complaint shows that defendant Earle held the bond of plaintiff for \$12,000; also a mortgage on plaintiff's property, collateral to the bond; that Earle had proceeded to fore-

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close, and had obtained and held a judgment or decree for the sale of the property mortgaged, and had advertised the property for sale under such judgment. In this condition of things defendant Ross arranged with plaintiff to purchase, if possible, the said judgment, bond and mortgage of Earle for the benefit of party Hammond ; the former to take the assignment and hold the title temporarily in his name, but for the benefit of party Hammond. The purchase-money was to be furnished in part by party Hammond, and the balance by party Ross. Party Ross succeeded in perfecting an agreement with Earle for the purchase, to which agreement plaintiff became a party, in the performance of which he participated by the payment of money and various other acts. The sale was adjourned by consent of parties, Earle and Hammond, pending negotiations relative to the assignment, and, finally, upon a day, and at a time and place agreed upon by all three parties, they met and the money, in legal tenders, made up by parties Ross and Hammond, was tendered to party Earle, and also a deed, in conformity with the agreement, prepared for Earle's signature, and presented with the tender of the money. Earle refused to assign or to receive the money, except on condition that he be allowed to retain the bond for the purpose of enforcing payment of a \$1,000 bonus previously disallowed by the court on the trial. The question of the bonus was in issue at such trial, and the decision respecting it was adverse to Earle, the holder of the mortgage.

This suit is brought to enforce the agreement between Earle and Ross, and a decree for specific performance is asked, with damages for non-performance.

The defendant Earle interposes seven separate and distinct answers or defenses, so called.

The answers demurred to by Earle are as follows :

"4th Defense. And this defendant, for a separate answer to said amended complaint, and as a fourth defense to the action of the plaintiff herein, on information and belief, says :

"That the contract set forth in said complaint is inoperative

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and void for want of a sufficient and adequate consideration therefor."

"6th Answer. And this defendant, for a separate answer to said amended complaint, and as a sixth defense to said action, on information and belief, says :

"That William A. Hammond is not a party to the alleged contract or agreement between said Elmore P. Ross and this defendant, and is not the real party interested therein.

"That the said plaintiff is not a proper party plaintiff in this action, and has no right to sue this defendant on said alleged contract or agreement individually, or as the legal representative of said Ross."

"7th Defense. And this defendant, for a further separate answer to said amended complaint, and as a seventh defense to said action, says :

"That he has suffered great loss, injury and special damage and expense in time and money by reason of the causeless and unjust litigation of the plaintiff in this action, and has also suffered loss of interest and paid expense in consequence of delay in obtaining the amount due him on his said judgment occasioned by the plaintiff's illegal and unjust proceedings in said action to foreclose said mortgage after the recovery of said judgment therein.

"And this defendant demands affirmative relief in this action and a judgment against said plaintiff therein for said loss, damage, injury and expense in the sum of three thousand dollars."

To the fourth defense plaintiff demurred on the ground that it is insufficient in law upon the face thereof.

To the sixth answer on the same ground.

The demurrer to the seventh answer specified six grounds :

(1.) That the answer is insufficient as a defense. (2.) That as a counter-claim it is not of the character specified in section 501, subdivision 1 of the Code. (3.) That it is not of the character specified in subdivision 2 of section 501, Code. (4.) That two supposed causes of action or counter-claims are improp-

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erly united. (5.) That there is another action pending for one of those claims. (6.) That no valid cause of action is stated.

Chauncey B. Ripley, attorney and of counsel for plaintiff demurring, in support of demurrer to fourth defense, urged the points following :

I. The answer is bad on demurrer, because, in averring that the contract is inoperative and void, it states no fact but a legal conclusion merely. Whether the contract referred to is "inoperative and void for want of a sufficient and adequate consideration" is a pure question of law, and one upon which the court alone could pass. The averment is, therefore, one of a conclusion of law, with no fact alleged in its support. Hence, the answer tenders no issue; it admits of no evidence; it would not support a verdict or a judgment. In pleading, such an averment is a mere nullity. Where, in an answer, the averment was, that the contract had no validity for want of consideration, it was held: the allegation is a conclusion of law merely, and clearly bad on demurrer. It was necessary to aver the facts which would show that (*Burrall agt. Bowen*, 21 *How.*, 380). To the same effect, and that such an averment is not issuable, but merely the inference or opinion of the pleader, see *Pomeroy's Remedies and Remedial Rights* (p. 570, sec. 531); and *Stephen on Pleading* (310 and cases cited).

II. The averment of mere inadequacy of consideration is entirely insufficient as a defense, (1) because inadequacy of consideration is never *per se* a defense in an action for specific performance, even if well pleaded; (2) inadequacy is not well pleaded in this answer for any purpose; the averment being a legal conclusion, supported by no fact, and merely the opinion of the pleader (*Pomeroy on Contracts, Specific Performance*, p. 269, sec. 10; secs. 192, 193, 194, and cases cited). (3.) And this answer is no defense in mitigation of damages, and is bad on demurrer in that aspect, because not therein distinctly stated that it is pleaded with that view and for that

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purpose only; it must so appear on its face to be thus available in mitigation (*Fry agt. Bennett*, 5 *Sand.*, 54, 74 and 75).

III. A valuable consideration is admitted; for this answer does not deny the making of the agreements upon a valuable consideration, and, therefore, by the rules of pleading, those allegations are to be deemed admitted (*Burrall agt. Bowen*, 21 *How.*, 378, 381). Moreover it would be preposterous to say of this fourth answer, that it is a denial; for it assumes both the existence of the agreement and a consideration for the same; for, otherwise, inadequacy could not be predicated of it (*Gould on Pleading*, p. 366, sec. 34). This fourth answer is to be regarded as if it stood alone, complete in itself, and unaided by any of the other answers (*Baldwin agt. U. S. Tel. Co.*, 54 *Barb.*, 505, 517; *Swift agt. Kingsley*, 24 *Barb.*, 541), and the valuable consideration which it concedes, is, as matter of law, a sufficient consideration (*Benson agt. Couchman*, 1 *Code R.*, 119).

IV. The answer, as a whole, is bad for insufficiency, and the demurrer well taken on that ground. No triable, material issue is tendered. A valuable consideration is pleaded in the complaint; it is also admitted by the answer itself. That a valuable consideration is all that is required to support the agreement, and that the plea of inadequacy of consideration is ill, because a conclusion of law, are shown above. Such an answer is demurrable for insufficiency (*Gould on Pl.*, ch., 6., p. 330, sec. 96; *Code Civ. Pro.*, sec. 495), and constitutes no defense. A demurrer to a supposed defense is well taken when the matter pleaded does not constitute a defense (*Merritt agt. Millard*, 5 *Bow.*, 645, 652, at foot of page).

V. The answer in question is one confessing the agreement upon a valuable consideration alleged in the complaint, and seeking to avoid its operation by averring that the agreement is void and the consideration inadequate. In short, it is an answer confessing the matters alleged in the complaint and pleading in opposition thereto, and in avoidance other matter, new matter (*Gould on Pl.*, p. 156, chap. 3, sec. 195).

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Under the Code plaintiff may demur to an answer which sets up (*Code Civ. Pro., sec., 494*), or attempts to set up (*White agt. Drake, 3 Abb. N. Cas., 133, 134, at foot*), or was intended to set up (*Rice agt. O'Connor, 10 Abb. Pr., 362, 364*), or professes to set up (*5 Bosw., 645, 652*) new matter as a defense. To same effect see *Savage agt. Corn Exchange Fire Insurance Company* (*4 Bosw., 15 at foot and 16 at top*), *Jackson agt. Whedon* (*1 E. D. Smith, 142*); and that the defense that plaintiff is not the real party in interest cannot be proved under a general denial, is distinctly held in *3 Abbott's New Cases (supra)*, and cases there cited. And when such supposed new matter is insufficient in law upon the face thereof to constitute any claim or defense whatever the pleading is ill and demurrer is the remedy on the ground of insufficiency (*id.*), and the only proper remedy (*Fabricotti agt. Lannitz 3 Sand., 743, 745*). Stating facts inconsistent with the complaint is not a denial. Denial must be direct (*Wood agt. Whiting, 21 Barb., 190*).

VI. This action is well brought, as respects the remedy asked, and the proper party is named as plaintiff. (1) Specific performance lies to compel the assignment of a judgment, because there are many uses to which a judgment could be put which could not be estimated or measured in damages (*Phillips agt. Berger, 2 Barb., 608*; *S. C., affirmed, 8 id., 527*; *Williard's Eq. Jur., p. 275*; *Adderly agt. Dixon, 1 Sim. & Stu., 607*; *Hamblin agt. Dinneford, 2 Edw. Ch., 531*; *Pomeroy on Contracts, pp. 547, 548, sec. 486*). (2) And the remedy is available to the party for whose benefit the agreement is made, and he may enforce specific performance, whether privy to the consideration or not (*Lawrence agt. Fox, 20 N. Y., 268, and cases following and affirming the doctrine therein established*; *Pomeroy on Contrs., sec. 486*). (3) Moreover, plaintiff was in the attitude of a party to the agreement, by reason of his participation in the same, by reason of part performance, and because he was entitled to benefits realized or to be realized; so held in a case almost precisely like the

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present case (*Van Wagenen* agt. *La Farge, and Lahens*, 13 *How.*, 16, 17; *Pomeroy on Confs.*, p. 548). (4) It was a new contract between the mortgagor and mortgagee, to which the proposed trustee, Ross, became a party. This new contract superseded and controlled the old contract defined and established by the decree or judgment (13 *How.*, 17, *supra*). (5) The remedy is under the new agreement, the agreement to assign the judgment (*Id.*). (6) The promise of Earle to Ross would alone sustain this action in party Hammond's name as plaintiff (*Lawrence* agt. *Fox*, 20 *N. Y.*, 368), if he were not even privy to the consideration. But he was a party, and performed in part, and tendered full performance, and was to be benefited, and was, in fact, damaged.

VII. The statute of frauds does not operate to defeat or render void an agreement of this character, for want of written memorandum, for want of mutuality, or for want of consideration, since the courts do not undertake to enforce it specifically as a contract, but as the only means of restoring the plaintiff to all his rights (*McNeil* agt. *Call* 19 *New Hampshire*, vol. 8 [2d. series], 403, 415, 416; *Wheeler* agt. *Reynolds*, 66 *N. Y.*, 227, 233).

VIII. But the contract was in writing, was mutual, and was upon a valuable consideration, and embraced all the essential elements as defined by Comyn, and approved by the court of appeals (*Justice* agt. *Lang*, 42 *N. Y.*, 493, 494). Besides, it was partly performed, and full performance thereof tendered.

And in support of demurrer to sixth defense, the following:

I. The answer is bad on demurrer for the reason that no fact is stated, nothing but a conclusion of law. This court has recently held that precise proposition, and where the gist of the supposed defense was identical with the present (*White* agt. *Drake*, 3 *Abb. N. Cas.*, 133, 134, II, and cases there cited; *Russell* agt. *Clapp*, 3 *Code R.*, 65; *Bentley* agt. *Jones*, 4 *How.*, 204, 205; *Thomas* agt. *Desmond*, 12 *How.*, 321; *Brown* agt. *Ryckman*, *id.*, 314; *Seeley* agt. *Engell*, 17 *Barb.*, 537; *Jackson* agt. *Whedon*, 1 *E. D. Smith*, 142; *Savage* agt.

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Corn Exchange Bank, &c., 4 *Bosw.*, 15 and 16; *Pomeroy's Remedies and Remedial Rights*, p. 733, sec. 711 and cases there cited). And, too, in *White agt. Drake*, and cases there cited, the name of the alleged real party was given, making the case stronger for the defendant than the present. For aught that appears in this answer, plaintiff might have been a trustee of an express trust. The answer should have negatived that, too (*Thompkins agt. Acer*, 10 *How.*, 309). The answer, as it stands, admits of no evidence on the question of real party in interest (*Seeley agt. Engell*, 17 *Barb.*, 530).

II. The remedy of defendant is demurrer, and demurrer is his only remedy. Such is impliedly held (*White agt. Drake*, p. 135, 3 *Abb. N. Cas.*) in the allusion to *Tamasier agt. Cassard* (17 *Abb.*, 187), that there is simply enough in an answer of this character to put the plaintiff to his demurrer. Such an answer is not frivolous, because it is directed at an essential requisite to every action, to wit, that it must be prosecuted by the real party in interest. But facts alone are requisite to show that any given action is not so prosecuted.

IV. The allegations of the complaint are deemed admitted in this answer by the well-known rules of pleading, because they are not denied (*Burrall agt. Bowen*, 21 *How.*, 378, 381), and no fact is stated in the answer, inconsistent with any alleged fact in the complaint.

And in support of demurrer to seventh defense the following:

I. This answer is demurrable because it alleges no facts from which the court can infer, as matter of law, that the defendant has suffered damage. It is essential, in support of a claim for special damages, that the facts be stated from which damages can be inferred; but otherwise where the claim is for general damages, because in the latter case the law always presumes damages, while in the former case never. The distinction is drawn and the above proposition fully sustained by authority (*Thompson agt. Gould*, 16 *Abb. [N. S.]*, 424, 427; *Solms agt. Lias*, 16 *Abb. Pr.*, 311; *Saunders on*

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Pleading and Evidence, vol. 1. p. [136], *place, averment of damages*). On principal as well as authority this is so, for no incurred expense is shown by the answer as a basis for proving special damages. (1.) Expense of litigation is compensated by costs to the prevailing party. (2.) Loss of interest, too, is uniformly provided for in final judgment, it follows, as a matter of course to the prevailing party, at the legal rate and is the full measure of damages (*Sedg. on Damages* [374], 462). (3.) No damages result, by presumption, from any averment in this answer, nor is the absence of essential facts supplied by the formal statement, "in consequence of" which is an inference of the pleader (*Gould agt. Allen*, 1 *Wend.*, 182). (4.) This is not one of those cases, like a breach of contract for example, which imports nominal damages (*Wills agt. Simmons*, 8 *Hum.*, 202; *Saunders Pl. and Ev.*, *supra*).

II. Respecting the character of the objectionable litigation no issuable fact is stated in the answer, only legal conclusions. There is nothing which would support a judgment or uphold a verdict, even if default were made by plaintiff and no reply interposed. (1.) Whether the litigation has been "causeless and unjust," or otherwise, is a question of law for the court, and the inference of the pleader thus declared avails nothing in pleading. "What plaintiff did or did not must be shown by averment of fact" (*Mills agt. Gould*, 1 *Abb. N. Cas.*, 93, 97). (2.) And even if the litigation were shown by averment of facts to have been causeless and unjust, it would then be incumbent upon defendant to show by further issuable averments that it was, as matter of fact, thus "by reason of" some actionable conduct on plaintiff's part. No such fact appears on the face of the answer, only an assertion, the bare say so of the pleader. That the "great injury suffered" was in fact by reason of litigation is not based upon any thing beyond such assertion itself (*The Commercial Bank of Rochester agt. The City of Rochester*, 41 *Barb.*, 341).

III. Another fatal defect in this anomalous answer, is absence of any averment of *scienter*. That defendant

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engaged in causeless and unjust litigation with plaintiff is not enough. It must be further shown that he knew the litigation to be causeless and unjust. This he has not done. He cannot, therefore, under his answer, prove *scienter*, and demurrer lies (*Waterman agt. Freeman*, 1 *Hobart's Reports*, 434, 444, *at foot*). This is so, on principle, too; for, in every case of litigation, one of the contending parties fail; and yet to sue and defend is lawful, and courts are established by law to the end that parties may litigate. The presumption is that they have probable cause for their contentions in these tribunals, and the burden is on the party claiming damages to show bad faith on the part of his adversary; that he knew he had no cause of action or defense (*Compare Smith agt. Hayes*, *Irish Reports*, 1 *C. L.*, 333; *Besson agt. Southard*, 10 *N. Y.*, 236).

IV. The answer is insufficient as a whole. There is not a solitary, material, issuable fact stated in this answer, available either as a defense or a counter-claim. Nothing but legal conclusions, asserted inferences, and deductions of the pleader. And it is so apparent, upon the face of the paper itself, that no argument, or even analysis, is needed, in view of our Code and rules of pleading. Facts alone are available; issuable, material facts; facts, the denial of which tenders an issue; the admission of which would entitle the pleader to a judgment, or render the matter available as a defense. No such matter is present in this seventh answer; it is wholly insufficient under the Code, for any purpose (*Code*, *sec.* 494, *sec.* 481).

V. Two supposed causes of action are improperly united, to wit: (1) one for damages for litigation in this action; (2) another for damages in an action to foreclose. Defendant demands \$3,000 damages in both. The Code requires each cause of action to be stated separately. The same rules apply to a counter-claim as to a complaint. That this seventh answer is, as pleaded, intended as a counter-claim, by reason of the characterizing mark, to wit, demanding an affirmative

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judgment, is well settled in our practice (*Pomeroy on Remedies and Remedial Rights*, pp. 769, 770 and cases there cited). And this is so, even in cases where the matter pleaded is called a defense but, also, demands affirmative relief; the demand for damages and the nature of the relief indicated control rather than the mere designation (*Id.*; *Wilder agt. Boynton*, 63 Barb., 547). To one there may be a defense not common to the other. Moreover, one may arise from the transactions set forth in the complaint, and may be litigated with it in the same action; while the other may arise out of some other transaction, and be irrelevant to any issue involved. The supposed cause of action arising, as alleged, out of said action to foreclose, cannot be properly joined with the one alleged to arise out of this action, because the transaction of foreclosing a mortgage in one action, and that action not described, nor even named, as to title, cannot be assumed to be the same transaction as the present action. It does not appear who the parties were in the former suit, nor is it intimated that they were the same, as matter of fact. The demurrer is well taken under this point (*Code of Civ. Pro.*, sec. 501, subd. 1). The subject of the first action is the foreclosure of the mortgage; of the second, the assignment of the mortgage (*Code of Civ. Pro.*, sec. 501 [1]).

VI. Moreover, defendant Earle in admitting, by not denying (*Burrall agt. Bowen*, 21 How., 378, 381) the allegations of plaintiff's complaint, among others, the making of the agreement referred to therein; the breach of the same; and his own bad faith in attempting to extort a bonus, so adjudged to be by the court, as a condition for fulfilling his own obligation, has conceded both the legality and justice of plaintiff's case, and the defenselessness of the very answer under consideration. The answer, therefore, charging plaintiff's litigation herein to be causeless and unjust, has nothing whatever to uphold it, on defendant's admission itself, and falls of its own weight. As a defense, the answer is insufficient, *in toto*, upon its face, as to this action. The same is true as to the

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action to foreclose, so far as any allegation of the complaint identifies it with the action referred to by defendant Earle in his seventh answer.

J. M. Martin, attorney and of counsel for defendant Earle, in opposition, submitted the following: The complaint is demurrable; the action is not well brought by Hammond (*The People* agt. *Booth*, 32 *N. Y.*, 397, 398; *Stoddard* agt. *Onondaga Annual Conference*, 12 *Barb.*, 573; *sec. 499 Code Civil Pro.*; *The Merchant's Mutual Ins. Co.* agt. *Eaton et al.*, 11 *Leg. Obs.*, 140; *Ripley* agt. *Astor Fire Ins. Co.*, 17 *How.*, 444; *Ennis* agt. *The Harmony Fire Ins. Co.*, 3 *Bosw.*, 516; *Killmore* agt. *Culver*, 24 *Barb.*, 656; *Hays* agt. *Hathorn et al.*, 74 *N. Y.*, 486; *Greaves* agt. *Gouge*, 69 *N. Y.*, 154; *Hasbrouck et al.* agt. *Bunce et al.*, 62 *N. Y.*, 475; *Springer* agt. *Dwyer*, 50 *N. Y.* 19; *Barber* agt. *Kerr*, 3 *Barb.*, 149; *Leonard* agt. *Huntington*, 15 *John.*, 236; *Savage* agt. *The Corn Exchange Fire and Inland Navigation Ins. Co.*, 4 *Bos.*, 2; *Smith* agt. *Hall*, 67 *N. Y.*, 48; *Ives* agt. *Van Epps*, 22 *Wend.*, 154, 155; *Dodge* agt. *Tileston*, 12 *Pick.*, 328, 329; 13 *Ala.*, 587; 20 *Mo.*, 433; 48 *Ill.*, 54).

LAWRENCE, J.—The demurrer to the fourth defense must be sustained. No reference is made, in the subdivision of the answer in which that defense is alleged, to the matters averred in the other parts of the answer. In *Baldwin* agt. *The United States Telegraph Company* (54 *Barb.*, 517), PORTER, J., in delivering the opinion of the court, says: "By the well-settled rules of pleading each answer must of itself be a complete answer to the whole complaint, as perfectly so as if it stood alone. Unless in terms it adopts or refers to the matter contained in some other answer, it must be tested as a pleading, alone by the matter itself contains" (*See, also, Swift* agt. *Kingsley*, 24 *Barb.*, 541). The defense to which this demurrer has been interposed does not refer to any other defense in the answer, nor to any of the allegations of fact

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contained in other defenses. If it is not complete in and of itself, it is, therefore, insufficient in law, and cannot be sustained by reference to the other defenses contained in the answer. Tested by this rule the fourth defense is clearly bad, because no facts are averred, simply the conclusion of law that the contract alleged in the complaint is inoperative and void for want of a sufficient and adequate consideration therefor (*See Burrall agt. Bowen*, 21 *Howard*, p. 378, *per* LEONARD, J.; *White agt. Drake*, 3 *Abbott*, N. C., p. 134 and cases cited *per* BARRETT, J.). The demurrer to the sixth defense, under the rule referred to, must also be sustained. As to this defense the case of *White agt. Drake* (3 *Abbott's New Cases*, p. 133) is directly in point. But I am of the opinion that the demurrer to the seventh defense should be overruled. If the allegations in respect to that defense were not sufficiently definite and certain to enable the plaintiff to understand them or to raise a clear and precise issue, the remedy by the plaintiff, is by motion to make more definite and certain. In *Springer agt. Dwyer* (50 *N. Y.*, 19) the court of appeals held that where the answer alleges facts sufficient to constitute a defense of recoupment, it is not necessary for the defendant to state what he will rely upon, and if he so states, he will not be precluded from insisting upon any defense which the facts alleged will justify. The facts alleged in the seventh defense are sufficient to entitle the defendant to a recoupment of his damages, and even if they are obscurely or vaguely set forth, the answer is not for that reason demurrable. As the defendant has partially succeeded on the demurrers, he should be allowed to answer without payment of costs. Ordered accordingly.

Woodmansee and Garside agt. Rodgers.

SUPREME COURT.

LUMAN WOODMANSEE and ABRAHAM GARSIDE agt. AMOS S. RODGERS.

Attachment — Code of Civil Procedure, section 682 — mere levy not an actual application of attached property under this section — Vacation of, by subsequent attaching creditor.

A mere levy is not an actual application of the attached property under section 682 of the Code of Civil Procedure, so as to prevent a subsequent attaching creditor from applying to vacate the same as provided in this section (*affirming S. C., ante 98*).

Where the levy is of goods, wares and merchandise, the actual application must be of the proceeds thereof after sale, to prevent the motion to vacate the attachment.

First Department, General Term, March, 1880.

ON the twentieth of October last, Luman Woodmansee and Abraham Garside, creditors of Amos S. Rodgers, obtained a warrant of attachment in the supreme court against the property of the debtor. The warrant was issued to the sheriff, who levied on the property of the defendant thereunder; the plaintiffs subsequently obtained judgment in the action and issued execution thereon. In the meantime and before the entry of the judgment, Weil Brothers, also creditors of Rodgers, obtained an attachment against his property, and before the same had been sold by the sheriff, a motion was made in their behalf to vacate the attachment of Woodmansee & Garside, upon the affidavit upon which the same was granted. The motion was made under section 682 of the Code, and was argued before judge BRADY, who vacated the attachment of Woodmansee & Garside, in an opinion which, with plaintiff's affidavit, will be found *ante*, page 98. An appeal was thereupon taken to the general term, which affirmed the order of judge BRADY, rendering the following opinion.

Otto Howitz, for plaintiffs.

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Blumensteil & Hirsch, for Weil Brothers, subsequent attaching creditors.

DAVIS, C. J.—This motion was made by subsequently attaching creditors to vacate a prior attachment of the appellants, both having attached the same property. Section 682 of the Code provides that the defendant, or any person who has acquired a lien upon, or interest in, his property after it was attached, may, at any time before the actual application of the attached property or the proceeds to the payment of a judgment recovered in the action, apply to vacate or modify the warrant.

It has been held that a creditor who has obtained and levied a subsequent attachment may move, under this section, to vacate a prior attachment (*Steuben Co. Natl. Bank agt. Alberger*, 55 *How.*, 481; 56 *id.*, 345). It does not seem to be disputed but that the attachment in the action of the appellants was issued upon an affidavit which was insufficient to uphold it. The only question presented was whether there was such an application of the attached property to the payment of the judgment as cuts off the right to make the motion under section 682. The court below held that a sufficient application was not shown. What is shown is, in substance, as follows:

The appellants commenced an action on October 20, 1879, against A. S. Rodgers, and on that day made application to a judge of this court for, and obtained a warrant of attachment against the property of the defendant. Upon that warrant certain goods, wares and merchandise of the defendant were attached on said 20th day of October, 1879.

On the 27th October, 1879, an execution on a judgment in the action, which seems to have been recovered, as we must assume, regularly, was issued and delivered to the sheriff, who, on the last-mentioned day, as he states in his affidavit, "did levy upon said property of the defendant by virtue of said

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execution, and did apply the said property heretofore attached as aforesaid to said execution."

The moving creditors, according to the affidavit of their attorney, did, on the 2d day of October, 1879, obtain a warrant of attachment against the above-named defendant in the marine court, and the attorney swears "that by virtue of said attachment and levy the said Simon Weil and Isaac Weil have acquired a lien upon the property of the defendant, after the same was levied upon under a warrant of attachment issued in the above action. It is not shown whether the attachment of these creditors was levied upon before or after the levy or the execution. That fact, however, is perhaps not important in determining the precise question before us, though it may become so at some future stage of the controversy. As aforesaid, the only question here is whether the levy satisfies the language of the Code. That language, it will be observed, is "actual application," etc. It is settled by authority that a levy of an execution upon property is a satisfaction of the judgment *sub modo*, and not absolutely (*Green agt. Brock*, 23 *Wend.*, 490, 491 and cases there cited). The property described in this case is described as goods, wares and merchandise. It does not, therefore, appear to have been something of which the sheriff could have made direct application to the judge, but property which must first have been sold, and the proceeds of the sale then applied. The section of the Code provides for both of these cases — the one of an actual application of the attached property as of money, and the other of the proceeds thereof. Where the levy, therefore, is of goods, wares and merchandise, the actual application must be of the proceeds thereof after sale, to prevent the motion to vacate the attachment. In this case there was nothing more than a levy by the sheriff under an execution on the twenty-second day of October, although he states that he did on that day "apply the said property heretofore attached as aforesaid to said execution." Yet neither he nor any one else stated that it or its proceeds was applied to the payment

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of the judgment. Saying that he has applied the property to said execution is nothing more than another form of asserting that he had levied under it.

Our conclusion, therefore, is that there was no such application as the Code requires, and that the attachment was properly vacated.

We do not pass upon the question whether the appellants have a right by virtue of a levy of the execution to hold the property, because their rights in that respect may depend upon the question of facts not appearing in the papers.

SUPREME COURT.

THE PEOPLE *ex rel.* FRANCIS HIGGINS, as receiver, &c., agt.
DAVID McADAM, justice, &c., *et al.*

Summary proceeding — when to be enjoined by writ of prohibition.

Where F. commenced summary proceedings, under the statute, to dispossess H. from certain premises to which F. claimed title under an execution sale upon a judgment against the owner of the tenement and of the ground lease; upon the return of the summons the tenant's counsel objected that the proceedings in such a case could only be maintained against the execution debtor. Judge McADAM overruled this objection and adjourned the proceeding for trial. Higgins, the receiver of the judgment debtor's estate, against whom the various proceedings were allowed to be continued by order of the court that appointed him, applied for a writ of prohibition:

Held, that the admitted facts took the litigation without the operation of the statute and, consequently, without the jurisdiction of the court and a writ of prohibition was the proper remedy.

Special Term, March, 1880.

On the 29th of January, 1880, James A. Flack commenced summary proceedings, under the statute, to dispossess Virginia Herring from the premises No. 305 West Twenty-second

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street, in the city of New York. The applicant, Mr. Flack, claimed title to the premises under an execution sale upon a judgment against the owner of the tenement and of the ground lease.

Upon the return of the summons the tenant's counsel objected that the proceedings in such a case could only be maintained against the execution debtor.

Judge McADAM overruled this objection and adjourned the proceeding for trial. In the meantime Mr. Higgins, the receiver of the judgment debtor's estate, against whom the various proceedings were allowed to be continued by order of the court that appointed him, applied for a writ of prohibition.

These facts were returned, the return was demurred to and the matter argued.

Butler, Stillman & Hubbard and *Samuel Jones*, for relator.

Wm. A. Coursen, H. W. Bookstaver and *A. McIntire*, for landlord and respondent.

BEACH, J. — Whether or not the relator has taken the proper remedy by this proceeding is the principal question presented for consideration. It is one of much difficulty arising from the indistinct boundary line between the unwarranted assumption of jurisdiction by an inferior tribunal and the decision of those matters involved in the proceedings over which the tribunal, confessedly, has jurisdiction. The former falls within the province of the writ of prohibition; the latter, if erroneous, is to be corrected on appeal.

It is, in my opinion, this distinction which is established by numerous adjudications (3d *Black. Com.*, 112; *Appo* agt. *The People*, 20 *N. Y. R.*, 531; *Thompson* agt. *Tracy*, 60 *N. Y. R.*, 31; *The People ex rel. Wheeler* agt. *Cooper, Mayor, &c.*, 57 *How.*, 416.)

In *The People* agt. *Russell* (49 *Barb.*, 351) the learned justice who made the decision entertained the opinion that

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jurisdiction was "settled by the nature of the proceeding." I am forced, with great respect, to differ from that statement. If correct it would be difficult to imagine any case where an inferior court having general jurisdiction of the subject under certain conditions would become amenable to the writ, although the admitted facts in the case should show it not to be within those conditions. The answer would always be conclusive, in such view, that the remedy was by appeal. The learned judge writing the opinion in *Appo* agt. *The People* (*supra*) says: "The necessity for the writ is the same where, in a matter of which the tribunal has jurisdiction, it goes beyond its legitimate powers."

The distinction is again apparent in *Thompson* agt. *Tracy* (*supra*). The learned judge speaking of the province of the writ says: "It cannot be made a drag net, by means of which all controverted and litigated questions between individual suitors may be brought into court and tried and determined." This language surely does not include a case where the conceded facts would show a want of jurisdiction. In summary proceedings the allegation of payment is a defense to the landlord's claim, and no one could suppose that, upon the concession of the fact, this court would issue the writ, for the disposition of that question is one of the needful attributes of the tribunal authorized to try the issue between the landlord and tenant. This, to my mind, is far different where the admitted facts take the litigation without the operation of the statute and, consequently, without the jurisdiction of the court.

In my opinion the case at bar belongs to the latter description.

The demurrer to the return is sustained and the writ made absolute.

Christian agt. Gouge and another.

SUPERIOR COURT.

ANNETTE G. CHRISTIAN agt. EDWARD H. GOUGE and another.

Security for costs — Non-resident plaintiff not permitted to prosecute in forma pauperis.

It seems that the statute permitting a plaintiff to prosecute as a poor person is not intended to apply to non-residents, but was solely for the benefit of residents of the state.

Special Term, February, 1880.

PRIOR to the commencement of the action the plaintiff filed her petition for leave to prosecute *in forma pauperis* and permission was given so to do.

After issue the defendant, upon an affidavit stating that the plaintiff was a non-resident, made a motion to set aside the order permitting the plaintiff to prosecute *in forma pauperis*, and to compel her to file security for costs.

Ambrose Monell, for defendant, in support of the motion, contended that the statute permitting a plaintiff to prosecute as a poor person was not intended to apply to non-residents, but was solely for the benefit of residents of the state, and cited *Brown agt. Story* (1 *Paige*, 588), *Isnard agt. Cazeau* (1 *id.*, 39), *Moore agt. Cooley* (2 *Hill*, 412), *Thomas agt. Wilson* (6 *Hill*, 257).

James B. Dill, for plaintiff.

SEDGWICK, J.—The letter and policy of the acts in relation to security to be given by non-resident plaintiffs indicate that it is not unjust or impolitic to refuse leave to a non-resident to sue here, unless he gives security for costs even though, in fact, he is pecuniarily responsible. He must furnish some

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one who will respond for him in this state. If he cannot, the state does not furnish him means of pursuing a remedy here.

It seems to me inconsistent with this policy that an irresponsible non-resident should be allowed to sue without even a liability for costs.

I am of opinion that the order allowing the plaintiff to sue *in forma pauperis* should be vacated ; but as the action was begun under the order relieving her from costs, &c., she should have an election to discontinue without costs. On this motion she cannot be required to give security.

N. Y. COMMON PLEAS.

In the Matter of the Accounting of EDWARD H. BAILEY, as assignee of NATHAN L. BURDICK and ISAAC N. BURDICK, insolvent debtors.

*Assignment — who entitled to share in the distribution of the trust fund —
What is presentation or proof of claim within the meaning of the statute.*

A creditor, named as such in the schedules, is not entitled to a distributive share of the trust funds without making presentation or proof of his claim.

The statute (*Laws of 1877, chap. 466*) does not authorize indiscriminate distribution to all persons named as creditors in the schedules. The naming of a creditor in the schedule is not a presentation or proof of his claim within the meaning and intent of the statute.

If any person has a claim against the trust fund he should present and prove the same and invite an investigation as to its validity. Creditors who have fulfilled these requirements are the only ones entitled to share in the distribution of the fund.

General Term, April, 1880.

Before DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

Matter of accounting of Bailey.

William Lindsay, for appellant.

Noxon Campbell, for assignee.

LARREMORE, J. — This is an appeal from an order on a final accounting directing the distribution of the trust fund among all the creditors named in the schedules of the insolvents, irrespective of any proof of the claims mentioned in such schedules.

The learned judge, from whose order this appeal is taken, has intimated an acquiescence in the view contended for by the appellants (*In re John D. Wienholz*, July 25, 1878). But while reiterating the same opinion in his decision of this application he felt constrained to follow the ruling *In the Matter of the Accounting of Oakley, assignee* (S. 2, vol. 1 of *American Insolvency Reports*), and granted the order which is the subject of this appeal. The question thereby presented is, whether a creditor, named as such in the schedules, is entitled to a distributive share of the trust funds without making presentation or proof of his claim.

Prior to the act of April 13, 1860 (*Laws of 1860, chapter 348*) the only mode of passing the account of an assignee of a trust fund was by a suit in equity in behalf of the party plaintiff and all interested in the assignment who should, after due notice, come in and claim the benefit thereof by proving their claims (*Kerr agt. Blodgett*, 48 N. Y., 62).

The act above mentioned was intended as a summary remedy to accomplish the same object, and the various amendments made thereto have all had, for their purpose, the abridging of the practice without impairing the spirit and intention of the law relating to special trusts.

A cardinal principle thereof is the good faith of each transaction subjected to review; and to this end all the safeguards of inspection, examination and legal adjudication have been made applicable to test the validity and honesty of the proceedings.

Matter of accounting of Bailey.

Collusion on the part of the assignor or his creditors, or of any party interested, has always been open to legal investigation. The legislature, on June 16, 1877, passed an "Act in relation to assignments of the estates of debtors for the benefit of creditors" (*Laws 1877, chap. 466*) which repeals all former acts upon the subject. Section 4 of this act authorizes the assignee to advertise for creditors to present to him their claims with vouchers therefor duly verified. Section 13 provides that a citation for an accounting to all parties who are interested in the fund must be served, except that if the time limited by the advertisement for presentation of claims has expired, before the issue of the citation, creditors who have not duly presented their claims need not be served.

The referee found in favor of the creditors who had presented their claims and who appeared upon the accounting. This ruling was in conformity with the statute, which does not authorize indiscriminate distribution to all persons named as creditors in the schedules. To hold otherwise would be to allow the assignor to pass upon the validity of all claims not presented or proved. The naming of a creditor in the schedule is not a presentation or proof of his claim within the meaning and intent of the statute. An assignor might name in his schedule a creditor for a fictitious debt. The creditor makes no presentation or proof of his claim, thus escaping the scrutiny and examination of the other creditors and, also, the necessity of substantiating his demand by his oath. It is obvious that if no distinction were made between such a claim and claims duly presented and proved a wide door would be opened to fraud and collusion, and an act that was passed for the benefit of creditors perverted.

The assignee is liable on his bond for twenty years unless legally discharged. It is a grave question whether an order for his discharge would protect him in the payment of a claim which was fraudulent, and which the creditors had no opportunity to object to or dispute. If any person has a claim against the trust fund he should present and prove the same

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and invite an investigation as to its validity. Creditors who have fulfilled these requirements are the only ones entitled to share in the distribution of the fund.

The order appealed from should be reversed, with costs.

DALY, C. J., concurs; J. F. DALY, J., dissenting.

CHEMUNG COUNTY COURT.

NORTHRUP LANSING, respondent, agt. HAMSON HOLDRIDGE,
impleaded, &c., appellant.

Married women — when husband not liable for the personal torts of his wife.

The statutes of 1860 and 1863, as to married women, have not altered the common-law liability of the husband for the personal torts of his wife, but when such torts are committed in the management and control of her separate property the rule is changed, and she only is liable.

The wife is liable in the same manner and to the same extent for frauds or torts committed in the management of her property, as she is upon contracts relating to it.

Where the wife of H. owned a house which was insured and was occupied by N. as a tenant; the wife set fire to it in the night and it burned down, and the tenant's furniture was destroyed; H., was temporarily absent from home in a neighboring state and was in no manner connected with her act; suit was brought by N., to recover for his damages against the wife, a daughter that was with her at the time of setting the fire and H. the husband.

Held, that H. the husband was not liable. That the plaintiff's damages resulted as a consequence of the tort committed by the wife in the management of her separate estate, and for these damages, she may now be sued alone, and she holds her property, as though "*husbandless*" from which to respond for the damages.

March, 1880.

MR. HOLDRIDGE's wife owned a house which was insured and was occupied by Lansing Northrup as a tenant. She set fire to it in the night and it burned down and the tenant's furniture was destroyed, his family barely escaping injury.

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Mr. Holdridge was temporarily absent from home in a neighboring state and was in no manner connected with her act. Northrup brought suit in justice's court to recover for his damages against the wife, a daughter that was with her at the time of setting the fire and the husband. Judgment was rendered in favor of Northrup for \$200 and costs, and from that judgment the husband alone appealed upon questions of law to the county court.

S. DEXTER, *County Judge*. — At common law, when a tort or a felony of an inferior degree was committed by the wife in the presence of the husband or by his direction, he alone was responsible (1 *Hale's P. C.*, 45 to 49; 4 *Black. Com.*, 29, *M.*; 2 *Kent Com.*, 149; *Cassin agt. Delany*, 38 *N. P.*, 178, 179). The ground of this liability rested upon the presumption that the tort of the wife resulted from the coercion of the husband.

When the tort was committed without the direction or presence of her husband, he was liable *with* her; but the reason of such liability did not rest on the ground that he, in contemplation of law, was guilty of the tort, but on the grounds following:

First. The wife could not be sued without her husband. They were one person at common law in that regard.

Second. The husband, by virtue of the marital relations, became the owner of his wife's personal estate, and entitled to the possession and rents, issues and profits of her real estate (*Capel agt. Powell*, 17 *C. B. [N. S.]*, 744, or 112 *E. C. R.*, 743; *Knowing agt. Manly et al.*, 49 *N. Y.*, 192).

The husband being thus possessed of his wife's property, the reason of the common-law rule, that he should be liable for her torts, is apparent.

But the reason of the rule as founded upon the last two propositions above stated no longer exists under the laws of our state.

"In an action or special proceeding, a married woman prose-

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utes or defends, alone or joined with other parties, as if she was single" (*Sec. 450, new Code*).

The husband acquires no interest in her property, by virtue of the marital relation. She owns and possesses and has the control and management of her separate estate, as fully and completely as the husband has of his. In the language of LAMONT, J., in *Peak agt. Lemon* (1 *Lans.*, 295, 299), in respect to her separate estate, she is regarded by our law as husbandless.

"When the reason of any particular law ceases, so does the law" (*Broom's Legal Maxims*, 67).

Applying these principles to the facts in this case, what conclusion will be reached?

The tort of the wife was not committed by the direction of the husband, or in his presence, or with his consent or knowledge. It was her house; the plaintiff was her tenant. The act was one done to her separate estate in an unlawful endeavor to convert the house into money by perpetrating a fraud upon the insurance company. The plaintiff's damages resulted as a consequence of the tort committed by the wife in the management of her separate estate. For these damages, she may now be sued alone, and she holds her property, as though "husbandless," from which to respond for the damages. In *Brown agt. Miller* (47 *N. Y.*, 577), in an action against the wife for fraud in a contract for the sale of her real estate, made by the husband as her agent, the court held the husband was not a necessary party, on the ground that it was a matter "having relation" to her separate estate.

CHURCH, Ch. J., said, in his opinion: "The wife is liable in the same manner and to the same extent for frauds or torts committed in the management of her property, as she is upon contracts relating to it."

After a careful examination of all the authorities cited, and many others, we find no case in conflict with the rule laid down above. We, therefore, conclude, upon authority as well as principle, that the appellant is not liable and the judgment should be reversed.

Killmer agt. Hobart and another.

SUPREME COURT.

NELSON B. KILLMER agt. G. A. HOBART and another, as receivers of the New Jersey Midland Railway Company.

Jurisdiction — When receivers appointed in another state cannot be sued in courts of this state — Attachment.

Receivers appointed in another state and operating a railway as such receivers, but having property in their hands as such receivers in this state, cannot be sued in the courts of this state and an attachment issued in such suit will be vacated.

Special Term, April, 1880.

THIS was a motion to vacate an attachment granted against the defendants in a suit brought against them as receivers appointed by the court of chancery of New Jersey, for the recovery of excessive freight alleged to have been charged by them as such receivers, for the transportation of milk to the city of New York.

Charles B. Alexander, for motion.

Charles S. Meyer, opposed.

DONOHUE, J. — The attachment should be vacated as asked. It is not trying the case on affidavits. The plaintiff fixed the character in which the defendants are sued and it is not open to question a judgment here would be against them as receivers and no lien on property in the hands of another jurisdiction. The attachment is of property as receivers and would take the very property now being administered by another court.

The persons sued are the custodians of the law of another state, and are simply the officers of another court and sued as such, and to reach what they hold in that way.

Motion granted, with costs.

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SUPREME COURT.

AARON McCONNELL, respondent, agt. FRANKLIN D.
SHERWOOD, sheriff, &c., appellant.

Assignment—what provisions in, render it fraudulent and void—Estoppel— not necessary to an equitable estoppel that the party should design to mislead.

If, as a matter of fact, it appears that the intent of the assignor in making the assignment was to enable him to make a compromise with his creditors, the assignment is fraudulent and void, though the terms of the instrument do not empower the assignee to make compromises, and where the authority to do the act is conferred in express terms by the assignment itself it must be equally void.

Where the assignee in an assignment is given the right to use this power, if, in *his* opinion, it would promote the interests of the assignor, his creditors and the assignee are not permitted to show that he did not intend to avail himself of this power, or use this discretion.

The doctrine applied to assignments, like other instruments and conveyances, is that if two constructions are possible, one of which renders the instrument void and the other renders it valid, that construction is to be adopted which makes it consistent with law.

Where the assignment to plaintiff was upon the following trusts and conditions: "First. To pay the costs and charges of these presents, and the expenses of executing the trust declared and set forth herein. To distribute and pay the remainder of said proceeds to all the creditors of the said party of the first part, for all debts and liabilities which the said party of the first part may be owing or indebted to any person, whatever; provided, however, that if there is not sufficient funds for the payment of all the debts of the said party of the first part, then the said debts are to be paid *pro rata*, or in proportion to their respective demands." "Third. That the party of the second part may have the right to compromise with the creditors of the party of the first part, for all his debts and liabilities which the party of the first part may be owing or indebted to any person, or if, in the opinion of the second party, it would be advantageous to the party of the first part, and to the creditors of the party of the first part." Then follows the usual residuum clause in favor of the assignor. The assignment, also, contains a provision that the assignee, in collecting the notes and accounts, may "*take a part for the whole when he shall deem it expedient*:"

Held, that this assignment should be construed as relating to the present

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tense and to the debts and liabilities of the assignor which existed or had been incurred at or before the making of the assignment.

Held, also, that assignment, in this instance, was void upon its face as calculated to hinder, delay and defraud the creditors of the assignor.

Held, further, that the assignment was void by reason of the provision contained in it that the assignee, in collecting the notes and accounts, may "*take a part for the whole when he shall deem it expedient.*"

Where the assignee, as he claims, with a view of aiding the sale of the balance of the stock, had purchased a small quantity of goods which he had added to the stock and which, at the time of the levy by the sheriff, was mingled with the residue of the stock and was being sold indiscriminately as part of the assigned stock; the sheriff was ignorant of the fact that any portion of the stock belonged to the plaintiff individually; at the time of the levy he made no claim to the property except as assignee; he forbid the sale on the executions expressly in his character as the assignee, not claiming or pretending to have any other title to any of the property sold, nor but that the whole of the goods sold were portions of the goods assigned to him under the assignment: *Held*, that the plaintiff is estopped from claiming, as against the sheriff, that he had any title to the goods which he claims to have purchased with his own money and to belong to him individually, and not as assignee.

It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has mislead another who acted upon it in good faith, and in the exercise of reasonable care and diligence under all the circumstances, that is enough.

Fourth Department, General Term, January, 1880.

ON the 28th day of November, 1878, Ward B. Van Housen, who was a merchant doing business at Howard, Steuben county, New York, made a general assignment of his property to Aaron McConnell, the plaintiff in this action.

The assignment, after providing for payment of expenses of the trust and a *pro rata* distribution of the property to the creditors, has this provision :

"Third. That the party of the second part may have the right to compromise with the creditors of the party of the first, for all his debts and liabilities which the party of the first part may be owing or indebted to any person, if in the

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opinion of the second party it would be advantageous *to the party of the first part* and to the creditors of the party of the first part." Then follows the usual residuum clause in favor of the assignor.

The assignment also contains a provision that the assignee, in collecting the notes and accounts, may "*take a part of the whole when he shall deem it expedient.*"

In December and January following, creditors of Van Housen, having obtained judgments against him, issued executions to the defendant as sheriff, under which he levied upon a portion of the assigned property, and in February, 1879, sold the same, after which the plaintiff brought this action for conversion of the property.

The defendant claims that the assignment is void on its face by reason of the provisions before mentioned, and void, in fact, because made to hinder, delay and defraud creditors.

The defendant proved various circumstances tending to show fraud in fact, viz.: Dating back the assignment and acknowledgment to November twenty-seventh, the day on which the first suit was brought; the assignor left in possession and allowed to sell until December second, accounting for only two dollars aggregate sales; employment of the assignor to sell the assigned property; the solvency of Van Housen when the assignment was made and undervaluation of the assets, and the property abstracted by the assignor.

The jury found a verdict for the plaintiff and a motion for new trial was made upon the judge's minutes and was denied, and from that order and the judgment, this appeal is brought.

J. F. Parkhurst, for appellant. I. The assignment is void on its face by reason of the provision which gives the assignee the right to compromise with creditors. Special provision in an assignment always excites suspicion (*Burrill on Assignments*, page 229). Every provision in an assignment ought to be narrowly scanned and closely watched (*Whalen agt.*

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Scott, 10 *Watts*, 237, 244). An authority expressly given to an assignee to sell upon credit, avoids the assignment (*Nicholson* agt. *Leavitt*, 6 *N. Y.*, 520; *Barney* agt. *Griffen*, 2 *N. Y.*, 365; *Whitney* agt. *Brows*, 11 *Barb.*, 198; *Van Rossum* agt. *Walker*, 11 *Barb.*, 287; *Litchfield* agt. *White*, 3 *Sandf. S. C. R.*, 545; *Townsend* agt. *Stearns*, 32 *N. Y.*, 215, 216; *Ogden* agt. *Peters*, 21 *N. Y.*, 23). Giving the right to the assignee to compromise with the creditors when he shall deem it advantageous to the assignor and the creditors, renders this assignment void on its face. First. Because it gives the assignee the right to give preferences (*Wakeman* agt. *Grover*, 4 *Paige*, 441; *Grover* agt. *Wakeman*, 11 *Wend.*, 203; *Burrill on Assignments* [3d ed.], p. 310; *Bump on Fraudulent Conveyances* [2d ed.], p. 419; *Bishop on Insolvent Debtors*, 193; *Hudson* agt. *Maze*, 4 *Ill.*, 578; *Smith* agt. *Leavitts*, 10 *Ala.*, 92; *Works* agt. *Ellis*, 50 *Barb.*, 512; *Keevil* agt. *Donaldson*, 20 *Kan.*, 165; *Bennett* agt. *Ellison*, 23 *Minn.*, 242; *Whitney* agt. *Kelley*, 67 *Me.*, 377; *Smith* agt. *Hurst*, 10 *Hare*, 30; *Boardman* agt. *Halliday*, 10 *Paige*, 227; *Barnum* agt. *Hempstead*, 7 *Paige*, 568). If, as a matter of fact, the assignment was made for the purpose of effecting a compromise with creditors, it is fraudulent and void, even though the terms of the instrument do not authorize a compromise (*Works* agt. *Ellis*, 50 *Barb.*, 512; *Bennett* agt. *Ellison*, 23 *Minn.*, 242). When, however, the authority to do the illegal act appears upon the face of the instrument it is conclusive evidence of the fraudulent intent, and the court must hold the instrument void as a matter of law (*Sheldon* agt. *Dodge*, 4 *Denio*, 218; *Nichols* agt. *McEwen*, 17 *N. Y.*, 22; *Goodrich* agt. *Downs*, 6 *Hill*, 438; *Southard* agt. *Benner et al.*, 72 *N. Y.*, 431; *Cavanaugh* agt. *Beckwith*, 44 *Barb.*, 192; *Benedict* agt. *Huntington*, 32 *N. Y.*, 223; *Nicholson* agt. *Leavitt*, 2 *Seld.*, 520; *Barney* agt. *Griffen*, 2 *Com.*, 365; *Edgell* agt. *Hart*, 9 *N. Y.*, 219; *Mittnacht* agt. *Kelley*, 3 *Keyes*, 407); and the assignee is not permitted to show that he did not intend to avail himself of the authority given him in the instrument (*Barney* agt. *Griffen*, 2 *Com.*,

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365; *Boardman* agt. *Halliday*, 10 *Paige*, 223; *Goodrich* agt. *Downs*, 6 *Hill*, 438). *Second.* It is contrary to the policy of the assignment law, that the assignee should be made the agent of the assignor for buying releases from the creditors for the assignor (2 *Edmond's Statutes*, p. 140, sec. 1; *Wilson* agt. *Robertson*, 21 *N. Y.*, 587; *Durham* agt. *Whitehead*, *id.*, 133; *Whitney* agt. *Kelley*, 67 *Me.*, 379; *Wyles* agt. *Beals*, 1 *Gray*, 233; *id.*, 239). A trustee cannot deal in his own behalf in the trust funds or property (*Holdridge* agt. *Gillespie*, 2 *John. Ch.*, 30; *Ackerman* agt. *Emmott*, 4 *Barb.*, 626; *Chapin* agt. *Weed*, *Clarke*, 464); nor even as agent for a third person (*Hawley* agt. *Cramer*, 4 *Cow.*, 717; *Gould* agt. *Gould*, 36 *Barb.*, 270); and purchases in such case accrue for the benefit of the *cestui que trust* (*Colburn* agt. *Morton*, 1 *Abb. Ct. App. Dec.*, 378). The court will not enforce it for the benefit of the trustee, even with the consent of the *cestui que trust* (*Monroe* agt. *Allaire*, 3 *Cai.*, 320). A trustee buying a debt against the estate can only be allowed the amount actually paid (*Quackenbush* agt. *Leonard*, 9 *Paige*, 334). He cannot be permitted to use information gained as trustee for buying in property for himself (3 *Atk.*, 37; 3 *P. Wms.*, 249; 1 *Salk.*, 155); nor will he be permitted to act for his own benefit in any contract upon the subject of the trust (*Green* agt. *Winter*, 1 *John. Ch.*, 26; *Vanhorne* agt. *Ford*, 5 *John. Ch.*, 388). An assignee will not be allowed to buy up the claims for himself (*In re Marquand*, 57 *How.*, 477). *Third.* The power to compromise vitiates the assignment because it authorizes the assignee to delay the distribution of the estate, in defiance of the court and for the benefit of the assignor (*McCleery* agt. *Allen*, 7 *Neb.*, 21; *Nicholson* agt. *Leavitt*, 2 *Seld.*, 520; *Works* agt. *Ellis*, 50 *Barb.*, 512; *Boardman* agt. *Halliday*, 10 *Paige*, 223; *Goodrich* agt. *Downs*, 6 *Hill*, 438; *Barney* agt. *Griffin*, 2 *Com.*, 365; *Benedict* agt. *Huntington*, 32 *N. Y.*, 223; *Brigham* agt. *Tillinghast*, 3 *Kern.*, 215; *Dunham* agt. *Waterman*, 17 *N. Y.*, 19). *Fourth.* These provisions illegally affect and control the ordinary discretion which the

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assignee must use as incident to the trust in disposing of the assets (*Dunham agt. Waterman*, 17 *N. Y.*, 19). *Fifth*. These provisions vitiate the assignment, because they authorize the assignee to pay the expense of making or attempting the compromise out of the estate (*Sewall agt. Russell*, 2 *Paige*, 176; *Mead agt. Philips*, 1 *Sandf. Ch.*, 83; *Planck agt. Schermerhorn*, 3 *Barb. Ch.*, 614; *Nichols agt. McEwen*, 17 *N. Y.*, 22; *In re Marquand*, 57 *How.*, 477; *Mackie agt. Cairns*, 5 *Cow.*, 579).

II. The assignment is also void because of the provision authorizing the assignee in collecting the notes and accounts to take "*a part for the whole when he shall deem it expedient*" (*Litchfield agt. White*, 7 *N. Y.*, 438; *Burrill on Assignments*, p. 14; *Hutchinson agt. Lord*, 1 *Wis.*, 286; *Bump on Fraudulent Conveyances*, p. 414; *Olmstead agt. Herrick*, 1 *E. D. Smith*, 310; *Metcalf agt. Van Brunt*, 37 *Barb.*, 621; *Woodburn agt. Mosher*, 9 *Barb.*, 255; *Dow agt. Platner*, 16 *N. Y.*, 562).

III. If the court shall hold the assignment void the only question remaining will be whether the plaintiff may still recover for the sixty dollars worth of property which he bought and mixed with the assigned goods. If one having charge of the property of others so confounds it with his own that it cannot be distinguished, he must bear the inconvenience and distinguish his own property or loose it (*Hart agt. Ten Eyck*, 2 *Johns. Ch.*, 108; *Lupton agt. White*, 15 *Vesey*, 432). The plaintiff is estopped by his own conduct from now claiming it individually (*Dezell agt. Odell*, 3 *Hill*, 215; *Young agt. Bushnell*, 8 *Bosw.*, 1; *Plumb agt. The Cattaraugus County Mutual Ins. Co.*, 18 *N. Y.*, 394; *Welland Canal Co. agt. Hathaway*, 8 *Wend.*, 483; *Smith agt. Hill*, 22 *Barb.*, 656).

Rumsey & Miller, for respondent.

TALCOTT, P. J. — This is an action brought against the sheriff of Steuben county for the seizing and conversion of

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certain personal property, constituting a stock of goods with which one Ward B. Van Housen had been carrying on business, a merchant at Howard in said county.

On the twenty-seventh day of November, the said Van Housen, being pressed by his creditors, made and executed an assignment to the plaintiff, of all his goods and effects for the benefit of all his creditors *pro rata*, and the plaintiff accepted the said assignment and gave the necessary security under the statute, and assumed to go on and sell and dispose of the said goods and merchandise by virtue of the said assignment, and while he was so engaged the defendant, as sheriff of the county and by virtue of several executions to him issued and delivered, levied upon so much of the said stock as remained unsold, and thereafter proceeded to sell so much thereof as was necessary to realize the amount of the said executions.

The assignment to the plaintiff was upon the following trusts and conditions :

“First. To pay the costs and charges of these presents and the expenses of executing the trust declared and set forth herein. To distribute and pay the remainder of said proceeds to all the creditors of the said party of the first part, for all debts and liabilities which the said party of the first part may be owing or indebted to any person whatever ; provided, however, that if there is not sufficient funds for the payment of all the debts of the said party of the first part, then the said debts are to be paid *pro rata*, or in proportion to their respective demands.

“Third. That the party of the second part may have the right to compromise with the creditors of the party of the first part for all his debts and liabilities which the party of the first part may be owing or indebted to any person, or if, in the opinion of the second party, it would be advantageous to the party of the first part and to the creditors of the party of the first part.

“The rest, residue and remainder, if any there be after paying said costs, charges, expenses and debts as aforesaid, the

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said party of the second part is to pay over to the said party of the first part, his executors, administrators or assigns."

Sundry objections are made to the validity of this assignment. It is urged that the assignment is void because it does not confine the distribution of the amount realized from the assigned property to the payment of such debts and claims as existed against the assignor at the time of the assignment, but authorizes the payment of debts which might be afterwards contracted by the assignor. If this be the true construction of the assignment it would undoubtedly be void for that reason; but it is doubtful whether this can be the true meaning and construction of the instrument.

The doctrine applied to these assignments, like other instruments and conveyances, is that if two constructions are possible, one of which renders the instrument void and the other renders it valid, that construction is to be adopted which makes it consistent with law, *ut res magis valeat quam peret*, and we think it reasonable to construe this assignment as relating to the present tense and to the debts and liabilities of the assignor which existed or had been incurred at or before the making of the assignment (*Brainard agt. Dunning*, 30 *N. Y.*, 211; *Townsend agt. Stearns*, 32 *N. Y.*, 209-214).

The clause, however, by which the assignee is authorized to compound with the creditors of the assignor for any sums for which he may be indebted to any person seems to fall within the condemnation of the adjudged cases, especially the leading case of *Wakeman agt. Grover* (4 *Paige*, 23) and *Grover agt. Wakeman* (11 *Wend.*, 187); see, also, *Boardman agt. Haliday* (10 *Paige*, 227) and *Dunham agt. Waterman* (17 *N. Y.*, 9).

If, as a matter of fact, it appears that the intent of the assignor in making the assignment was to enable him to make a compromise with his creditors, the assignment is fraudulent and void, though the terms of the instrument do not expressly empower the assignee to make compromises, and where the authority to do the act is conferred in express terms by the

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assignment itself, it must be equally void (*Works agt. Ellis*, 50 *Barb.*, 512; *Bennett agt. Ellison*, 23 *Min.*, 242).

It has a tendency to coerce the creditors to accept less than the full amount of their debts and to release the debtor. The assignee in this assignment is given the right to use this power if, in his opinion, it would promote the interests of the assignor and his creditors, and the assignee is not permitted to show that he did not intend to avail himself of this power or use this discretion (*Barney agt. Griffin*, 2 *Comst.*, 365; *Goodrich agt. Downs*, 6 *Hill*, 438).

True, a debtor, while he remains in the possession and control of his property, may compromise with any or all of his creditors, but when he makes an assignment of all his property he has put his property out of his hands and possession, so as to be screened from the process of the law by which collection can be enforced, and being beyond the reach of legal process he may the more easily operate upon the fears of his creditors, and induce compromises by them which they might not submit to if his property were in his own possession and open to the action of legal process. "The only ground upon which the validity of voluntary assignments can rest is, that they contemplate nothing but a distribution of the debtor's property to his creditors in some way." As was said by senator Tracy in *Grover agt. Wakeman (supra)*, "the only safe rule is to regard every assignment which operates to delay creditors for any purpose not distinctly calculated to promote their interests, as contrary to the statute of frauds." We are, therefore, of the opinion that the assignment in this instance was void upon its face, as calculated to hinder, delay and defraud the creditors of the assignor.

We think, also, that the assignment in this instance, was probably void by reason of a provision contained in it and not before quoted, viz.: That part of the assignment which, in authorizing the assignee to collect the debts and accounts due to the assignor, empowers him "when the party of the second part shall deem it expedient so to do," to take a part

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of the whole debt, in other words, conferring upon the assignee the power to compound for the debts due to the assignor, if he (the assignee) shall deem it expedient. Though an assignee may exercise such a discretion in a proper case, still, on the settlement of his accounts, his action in *that* respect is open to the examination of the creditors and of the court, and may by them be challenged for negligence, improvidence or interested motives; whereas, by this assignment it seems to have been intended that the "discretion" of the assignee shall solely determine the question whether he will accept a part instead of a whole of the debt due to the assignor, and to substitute such discretion as the final and sole arbiter in the premises in place of the rules of law and the opinion of the courts (*Townsend agt. Stearns*, 32 N. Y., 215, 216).

It seems that the plaintiff, as he claims, with a view of aiding the sale of the balance of the stock, had purchased a small quantity of sugar, some kerosene and a chest of tea, which he had added to the stock and which at the time of the levy was mingled with the residue of the stock and was being sold by Van Housen and the plaintiff indiscriminately, as part of the assigned stock. The sheriff was ignorant of the fact that the plaintiff had made those purchases, and of the fact that any portion of the stock belonged to the plaintiff individually. At the time of the levy the plaintiff did not claim any title to any part of the property except the chest of tea which he stated to the sheriff belonged to him individually, saying: "You have got a chest of tea here which belongs to me individually, I suppose you have no objection to my taking it?" And by the sheriff's consent he took the chest of tea, making no claim to any other property except as assignee. The plaintiff also, before the sale, demanded the property levied on as assignee, saying: "I came to make a demand of you, as assignee, of those goods." And the sheriff having no knowledge or intimation of any claim on the part of the plaintiff that any part of the goods seized was claimed by the plaintiff,

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except as assignee of Van Housen under the said assignment, went on and sold the stock, including the said sugar and kerosene, as the property of Van Housen.

The sale was duly advertised, the plaintiff attended the sale and was present at the sale most of the time. He forbid the sale on the executions expressly in his character as the assignee of Van Housen, not claiming or pretending to have any other title to any of the property sold, nor but that the whole of the goods sold were portions of the goods assigned to him under the assignment.

Under these circumstances it would be manifestly inequitable and unjust now to allow the plaintiff, as against the sheriff, to set up that he owned, individually, a small portion of the goods levied on by the sheriff and assumed to be a part of those owned by Van Housen. By his silence on the subject the sheriff was misled and induced to believe that all the property levied on and sold, except the chest of tea, was property embraced in Van Housen's assignment. "A man who will be silent when his conscience commands him to speak shall not be permitted to speak when his conscience commands him to be silent."

We think the plaintiff is estopped from claiming, as against the sheriff, that he had any title to the kerosene and sugar, which he claims to have purchased with his own money and to belong to him individually, and not as assignee (*Thornton agt. Blanchard*, 4 *Comst.*, 303; 3 *Hill*, 215; 15 *Wend.*, 474; 20 *id.*, 268; *Dows agt. Morewood*, 10 *Barb.*, 183; *Smith agt. Hill*, 22 *Barb.*, 656; *People ex rel. Knapp agt. Reeder*, 25 *N. Y.*, 302; *Roth agt. Wells*, 29 *N. Y.*, 471).

It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has mislead, another who acted upon it in good faith, and in the exercise of reasonable care and diligence, under all the circumstances, that is enough (*Man. and Traders' Bank agt. Hazard*, 30 *N. Y.*, 226; *Roth agt. Wells*, 29 *N. Y.*, 486).

Kuehnemundt agt. Haar and Hengstler.

We think, therefore, that the plaintiff was not entitled to recover for the sugar and kerosene claimed to have been added to the stock after the assignment. And the assignment being, in our judgment, void in law, upon its face, the judgment and order denying a new trial must be reversed.

Judgment and order reversed and new trial ordered, costs to abide the event.

N. Y. SUPERIOR COURT.

CHARLES F. KUEHNEMUNDT, plaintiff and respondent, agt. JOHN H. HAAR and JULIUS HENGSTLER, impleaded, &c., defendants and appellants.

Law of copartnership — The rights of the former partners as against each other — Complaint — Demurrer.

The firm of H. & Co., executed a general assignment, under the state laws, to M. for the benefit of their creditors. Pending the administration of the estate, K., one of the late firm, brought this action against his former partners for an accounting and for judgment for alleged overdrafts.

Held, that by virtue of the assignment, the title to all the firm assets was vested in the assignee, who alone could sue for their recovery, and that his proceedings, as well as his powers and duties, are regulated by statute. And the facts above set forth appearing upon the face of the complaint; also, *held*, that the complaint exhibited a complete defense, and that a demurrer, because it does not state facts sufficient, &c., was well taken, and should have been sustained at special term.

General Term, March, 1880.

Before SEDGWICK and FREEDMAN, JJ.

APPEAL from judgment and order overruling demurrer to complaint.

Kuehnemundt agt. Haar and Hengstler.

Jacob A. Gross, for appellants.

John L. Logan, for respondent.

FREEDMAN, *J.*—This is an action between partners for an accounting within certain limits, and the ground of the demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The complaint sets up a partnership, its dissolution by consent, that each of the defendants during the existence of the partnership drew out large sums of money in excess of the amount drawn by the plaintiff, and that no accounting has been had, and judgment is demanded that such partnership be declared dissolved, pursuant to said consent, and an account taken of all the said partnership dealings and transactions from the commencement of the partnership, and of the moneys received and paid by the partners respectively, and that the said accounts be adjusted, as between said partners, and the balance due each as from the other be declared, and for such other and further relief as to the court may seem just and proper. If this were all, the complaint might be sustained under the rule laid down in *Luddington agt. Taft* (10 Barb., 447), though it fails to show whether or not there are outstanding accounts or demands due to or from the firm, or property owned by the firm. But the complaint further alleges that the dissolution by consent took place in consequence of the insolvency of the firm, and that thereupon all the partners duly executed and delivered an assignment of all their partnership property and assets to one Frederick Meyer, under the insolvent laws of this state, for the benefit of their creditors, which said assignment was duly filed, and that said Meyer was duly qualified as such assignee, and entered upon the performance of his duty as such. The complaint, therefore, not only states a cause of action, but also facts sufficient to constitute a defense thereto, and the whole complaint must be considered together in determining its sufficiency upon demurrer (*Calvo agt. Davies*, 73 N. Y., 211).

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Upon all the facts pleaded the court will not interfere to settle accounts within the narrow limits prayed for, but will await the regular winding up of the affairs of the partnership under the insolvency proceedings.

In *Richardson agt. Bank of England* (4 Myl. & C., 165, 172), lord COTTENHAM said that nothing is more settled than that, even after the determination of the partnership, and before the settlement of the account, and before the payment of the joint debts or the realization of the partnership estate, "what may have been advanced by one partner, or received by another, can only constitute items in the account. There may be losses, the particular partner's share of which may be more than sufficient to exhaust what he has advanced, or profits more than equal to what the other has received; and until the amount of such profit and loss be ascertained by the winding up of the partnership affairs neither party has any remedy against, or liability to, the other for payment from one to the other of what may have been advanced or received."

The cause of action for the sums alleged to have been withdrawn by the defendants in excess, was in the firm at the time of its dissolution and of the assignment, and it passed by the general assignment to the assignee as an asset. He alone can maintain an action thereon, and his proceedings as well as his powers and duties are regulated by statute.

The judgment and order appealed from should be reversed, with costs, and an order entered sustaining the demurrer, with costs.

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SUPREME COURT.

THE PEOPLE agt. HENRY MOETT.

Application for a writ of error and a stay — If exception presents plausible ground of error stay should be granted — When it is the legal duty of a jury to reject the whole evidence of a witness.

If a jury are convinced of the intentional falsity of evidence and such willful perjury, committed for the purpose of deceiving and misleading them, has destroyed their confidence in the truthfulness of the man and of his whole story, it is their legal duty then to reject his entire testimony as proving nothing.

Where, on a trial for murder, the prisoner had been a witness in his own behalf and was the only person who gave direct evidence of the incidents of the transaction from having witnessed them, and the judge in charging the jury in regard to the evidence of the prisoner, among other things said: "And there is another thing in law which is just as clear and that is, when a party in a civil action *deliberately* swears false to one material part of his testimony, and the jury are satisfied that he has so sworn falsely, *intentionally false*, they are not only at liberty to reject it, but it *sometimes* is the duty of the jury to reject the whole. The maxim is *falsus in uno, falsus in omnibus*." To this portion of the charge there was an exception:

Held, that this exception did not present a plausible ground of error.

Where a witness commits perjury in a part of his evidence the whole should be rejected, because the corrupt motive and purpose *then* manifested must destroy all faith in the man.

When any doubt exists as to whether the witness has committed perjury in giving the evidence which is to be considered, it must be for the jury to decide whether, in the testimony to be weighed, perjury has been committed. But if that point, the actual commission of perjury in the cause on trial, is passed by an affirmative answer, *it seems* there could be no error in instructing the jury that a witness who has been confessedly corrupt and perjured, not upon some previous trial but during the progress of the one in which his evidence has been given to them, is entitled to no credit whatever.

When an exception is taken to the enunciation of a legal proposition by the court, such exception only presents the legal soundness or unsoundness of the utterance. If the charge, as made, is legally correct and counsel suppose that it requires some explanation to prevent the jury from being misled a specific request for that purpose should be made.

At Chambers, March, 1880.

The People agt. Moett.

Andrews & Cady, for prisoner.

Mr. Longley, district attorney, for people.

WESTBROOK, *J.* — At the Columbia county oyer and terminer, held in January, 1880, Mr. justice OSBORN presiding, Henry Moett was convicted of the crime of murder in the first degree for the homicide of his wife at the town of Taghkanic, in said county, on the 12th day of September, 1879, by shooting her with a pistol.

The evidence tends to show that the deceased sustained adulterous relations with one Jacob Proper. The claim of the people was that the prisoner had, with deliberate premeditation, gone to the house in which his then wife was residing and shot her. The defense insisted that the prisoner had come there to obtain his own furniture, having determined to abandon the wife for her unfaithfulness and leave her with her paramour, with whom she was then living in adulterous intercourse. When he reached the house, the defense further insisted, that a difficulty ensued with the wife who assaulted him with a pickax for the purpose of killing him, and that in the necessary defense of the prisoner's own person the wife was shot. The prisoner had been a witness in his own behalf, and was the only person who gave direct evidence of the incidents of the transaction from having witnessed them.

The application for the writ of error and stay presents only one point and that is this: the judge in charging the jury in regard to the evidence of the prisoner, among other things said: "And there is another thing in law, gentlemen, which is just as clear and that is, when a party in a civil action *deliberately* swears false to one material part of his testimony and the jury are satisfied that he had so sworn falsely, *intentionally false*, they are not only at liberty to reject it, but it *sometimes* is the duty of the jury to reject the whole. The maxim is '*falsus in uno, falsus in omnibus*.'" To this portion of the charge there was an exception. Does the exception

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present a plausible ground of error? If it does, according to the rule laid down by myself for my own guidance in the Latrimouille case, the stay should be granted. To this single point the discussion will be directed.

If the jury had been charged that *whenever* a witness had intentionally and deliberately sworn falsely as to the material fact they were bound, as matter of law, to reject the whole, then, perhaps, as the court of appeals, in *Deering agt. Metcalf* (74 N. Y., 501, *see pages* 506, 507), has expressed a doubt as to what should be the rule in such a case, the present application should be granted. As an original question, however, I should be inclined to hold that where a witness commits perjury in a part of his evidence the whole should be rejected, because the corrupt motive and purpose *then* manifested must destroy all faith in the man. In making this general statement I am aware that there will generally be some difficulty in the practical application of this rule, for it is seldom entirely clear that a witness has committed perjury in giving the evidence which is to be considered. When that doubt exists it must be for the jury to decide whether, in the testimony to be weighed, perjury has been committed. But if that point, the actual commission of perjury in the cause on trial, is passed by an affirmative answer, then it would seem there could be no error in instructing a jury that a witness who has been confessedly corrupt and perjured, not upon some previous trial but during the progress of the one in which his evidence has been given to them, is entitled to no credit whatever. The reason for so rejecting the whole is obvious, and it is, that as a corrupt motive governed him while giving the testimony to be considered, such motive must, when its presence is demonstrated, be deemed to apply to all that he then declares. This discussion, however, is unnecessary, for the judge did not so charge the jury, he simply told them that "*sometimes*" it would be their duty to reject the whole evidence of a witness who had, in their judgment, deliberately, willfully and intentionally sworn falsely to material facts upon the trial then in

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progress. Is not this sound? If a jury are convinced of the intentional falsity of evidence and such willful perjury, committed for the purpose of deceiving and misleading them, has destroyed their confidence in the truthfulness of the man and of his whole story, is it not their legal duty then to reject his entire testimony as proving nothing? It is true that some things which he has said may be believed to have occurred, not because of his statements, however, but on account of other proof. If the question first put must be answered in the affirmative then it follows that it is, as the judge charged, "sometimes" the legal duty of a jury to reject the whole evidence of a witness under the well-known maxim to which reference was made.

If the learned counsel for the prisoner thought the judge should also have instructed the jury when and under what circumstances they should apply the rule, they should have asked him to do so. When an exception is taken to the enunciation of a legal proposition by the court, such exception only presents the legal soundness or unsoundness of the utterance. If the charge as made is legally correct, and counsel suppose that it requires some explanation to prevent the jury from being misled, a specific request for that purpose should be made.

It is also evident, as it seems to me, that the jury could not possibly have supposed that the judge intended to instruct them, that they were bound to reject the entire testimony of the prisoner, merely because they believed a part was willfully false, for they were also told, immediately before the instruction was given of which complaint was made, that "they may accept such portions as they believe to be true; they may reject portions which they believe to be false; or they may reject the whole story as a fabrication and a falsehood." Other portions of the charge might also be referred to, to show that the jury were left to deal with the whole evidence as they thought fit. And having been told that they could "accept such portions" of the evidence of a wit-

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ness "as they believed to be true," though they also "may reject portions which they believed to be false," the jury could not be misled by an instruction which informed them that "*sometimes*" in a cause, a jury would be bound to reject the whole testimony of a witness as false, because of plain perjury in a part thereof, for they would be so bound whenever plain and palpable perjury committed before them destroyed all faith in the integrity of the witness.

It follows that this application must be denied.

N. Y. COMMON PLEAS.

THOMAS B. GUNNING agt. WILLIAM H. APPLETON, JOHN A. APPLETON, DANIEL S. APPLETON and WM. W. APPLETON.

Label — Complaint — Demurrer — Language which is not defamatory on its face — Actionable quality of words may be tested by demurrer.

As applied to one in a professional character, the language that is claimed to be actionable, *per se*, must "touch him" in that profession.

Where the complaint alleged that plaintiff, for nearly forty years past, has been, and still is, a practicing dental surgeon, and was of good name, fame and credit in such profession; that the defendants maliciously published, concerning plaintiff, in their said journal, a certain article, containing many detractive mistatements, and especially the false and defamatory matter following, to wit: "The late William H. Seward, when traveling around the world, and when at Tokohama, Japan, required the services of a dentist. Upon examination, it was found that the inferior maxilla was comparatively useless for masticating purposes, there being a false joint at the seat of the original fracture, no union having taken place. This case will be remembered, from the world-wide notoriety of the circumstances attending the injury, as well as the reports, which have been universally believed, that the patient was benefited by the treatment he received for the cure of his fracture."

Held, That the language is not defamatory on its face. It assumes to give an account of a circumstance in which many others besides plaintiff may be presumed to have had an interest. He is not therein

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referred to personally, or as one of a class. It is not alleged that no subsequent cure was effected, or that he was under treatment prior to the examination mentioned.

Held, also, that the allegations in the complaint, following the statement of the publication claimed to be libelous, can only be regarded as innuendoes to explain, not to extend the meaning of such publication.

Held, further, that no malice is presumable from the publication in question, and no right of action has accrued to plaintiff therefrom.

To impute to a professional man ignorance, or want of skill, in a particular transaction, is not actionable. To be actionable, words of that character must be spoken or written of him generally.

In an action for libel, the defendants have a right to test the actionable quality of the words by demurrer, and to that extent only is their pleading to be construed as an admission of the allegations of the complaint.

General Term, April, 1880.

J. E. Crowley, for appellant.

Douglas Campbell, for respondent.

LAREMORE, *J.*—The plaintiff sues to recover \$25,000 damages from the defendants, who compose the firm of D. Appleton & Co., for an alleged libel published in the New York Medical Journal, of which the defendants are and were the publishers and proprietors. He avers, in his complaint, that for nearly forty years past he has been and still is a practicing dental surgeon, and was of good name, fame and credit in such profession. That on or about March 1, 1879, the defendants maliciously published, concerning plaintiff, in their said journal, a certain article containing many detractive misstatements, and especially the false and defamatory matter following, to wit:

“The late William H. Seward, when traveling around the world, and when at Yokohama, Japan, required the services of a dentist. Upon examination it was found that the inferior maxilla was comparatively useless for masticating purposes, there being a false joint at the seat of the original fracture, no union having taken place.”

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"This case will be remembered from the world-wide notoriety of the circumstances attending the injury, as well as the reports, which have been universally believed, that the patient was benefited by the treatment he received for the cure of his fracture."

Plaintiff, by way of innuendo, in said complaint further alleges as follows :

"The said late Wm. H. Seward suffered during his life an injury to his lower jaw, whereby the same was fractured, and said fracture was treated for the cure thereof by this plaintiff, and this plaintiff had sole charge and care, professionally, of such treatment. The result of said treatment was that the said lower jaw was so restored as to be used efficiently by the patient, and the said treatment by this plaintiff resulted in a successful cure of said fracture, and both in and out of this plaintiff's profession the result of the said treatment has enhanced this plaintiff's reputation and standing as a dental surgeon.

"The said treatment and cure have received great attention both in this country and elsewhere, and this plaintiff has publicly and privately reported that the said William H. Seward was benefited by the treatment he received for the cure of said fractures, which treatment was under the sole professional charge of this plaintiff.

"That the reports of said treatment and cure, referred to in the publication above set forth, were prepared and disseminated by this plaintiff, and at the time of said publication, the said defendants knew that said reports were so prepared and disseminated by this plaintiff.

"That the said defendants, in and by said publication, charged and intended to charge this plaintiff with falsely and fraudulently claiming and reporting that the said Seward was benefited by the treatment he received from this plaintiff as a dental surgeon, for the cure of the said fractures.

"The said publication was false and defamatory, and calculated to, and did, seriously injure this plaintiff in his reputa-

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tion, good name and credit, and by reason thereof this plaintiff's practice as a dental surgeon is seriously impaired, and his professional reputation, good name and credit are materially injured, to his damage \$25,000."

There was a general demurrer to the complaint, which was sustained, and judgment entered thereon in defendant's favor, from which plaintiff appeals.

Our Code of Practice has greatly abridged the requirements of the common-law pleadings in actions of this nature. Section 535 of the Code of Civil Procedure provides that in an action for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arises, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff, and, if such allegation be controverted, he shall be bound to establish the same on the trial. But when the language published is not actionable *per se*, "and becomes so only by reference to extrinsic facts, the existence of those facts must be alleged in the complaint" (*Townsend on Slander and Libel*, sec. 310 and cases there cited).

In my judgment the language upon which this action is founded is not defamatory on its face. It assumes to give an account of a circumstance in which many others besides plaintiff may be presumed to have had an interest. He is not therein referred to personally or as one of a class. A fair criticism of the alleged libel would convey the idea that Mr. Seward, when at Yokohama, was examined by a dentist who discovered that the fracture Mr. Seward had sustained was not then cured. It is not alleged that no subsequent cure was effected, or that he was under treatment by plaintiff prior to the examination had at Yokohama. All that can be claimed, as against the defendants, is that they published as a fact that which the examination disclosed, namely, that the "reports which have been universally believed that the patient was

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benefited by the treatment he received for the cure of his fracture" were erroneous.

The plaintiff has not attempted to cover this point by a *colloquium* showing the extrinsic fact that the language used had reference to any period of time subsequent to that of the examination previously mentioned.

The allegations in the complaint following the statement of the publication claimed to be libelous can only be regarded as innuendoes to explain, not to extend the meaning of such publication (*Watson* agt. *Nicholas*, 6 *Humph.*, 174; *Beardsley* agt. *Tappan*, 1 *Blatch. C. C.*, 588; 1 *Stark on Slander*, 418; *Van Vechten* agt. *Hopkins*, 5 *Johns.*, 220; *McCloughy* agt. *Wetmore*, 6 *Johns.*, 83; *Thomas* agt. *Crosswell*, 7 *Johns.*, 271; *Weed* agt. *Bibbins*, 32 *Barb.*, 315; *Townsend on Slan. and Lib.*, sec. 336 and cases cited; *Fay* agt. *Bennett*, 5 *Sand.*, 54).

As applied to one in a professional character the language that is claimed to be actionable *per se* must, in the phraseology of the books, "touch him" in that profession (*Van Tassel* agt. *Capron*, 1 *Denio*, 250).

Furthermore there is no general imputation of ignorance or want of skill in the pleading before us, and a charge of professional ignorance or incapacity in a particular transaction, even if such could here be inferred, would not be actionable (*Garr* agt. *Selden*, 6 *Barb.*, 416; *Camp* agt. *Martin*, 23 *Conn.*, 86; *Dunn* agt. *Anderson*, 3 *Bing.*, 88). The defendants had a right to test the actionable quality of the words by demurrer (*Wood* agt. *Brown*, 6 *Taunt.*, 169), and to that extent only is their pleading to be construed as an admission of the allegations of the complaint.

After a careful consideration of the whole scope and object of the publication, which were germane to the legitimate purposes of a medical journal, I am of opinion that no malice is presumable from the publication in question, and that no right of action has accrued to plaintiff therefrom.

The judgment appealed from should be affirmed.

Pardee agt. Tilton.

SUPREME COURT.

CHARLES PARDEE, respondent, agt. DAVID TILTON, appellant.

Supplementary proceedings — order in, should not direct proceedings to be sent to another county — representatives of deceased plaintiff may institute.

An order in supplementary proceedings should not direct the proceedings to be sent to any other county than that in which the examination is had.

The representatives of a party whose rights, under the judgment and execution, had been determined prior to September, 1877, may institute supplemental proceedings without renewing the action.

First Department, General Term, February, 1880.

APPEAL from order of a judge of this court, denying motion to vacate order in supplemental proceedings.

On the 13th of June, 1877, Charles Pardee recovered a judgment in this court against the defendant for \$1,184.44, which judgment was on that date docketed and filed in the office of the clerk of the county of Onondaga. On the fifteenth of June, a transcript was duly docketed in New York county, and an execution there issued was returned unsatisfied.

On the 9th of April, 1878, Charles Pardee died, and, on the twenty-second of July following, Jacob C. De Witt was appointed administrator of his estate. The defendant then resided, and still resides, in the city of New York. On the 3d of May, 1879, the said administrator applied to Mr. justice NOXON, in Onondaga county, for an order in supplemental proceedings, and an order was by him made, which directed the defendant to appear before a referee named in the order, in the city of New York, and which directed the referee to reduce the examination to writing, and report the same to Mr. justice NOXON. The order also directed that all subse-

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quent proceedings should be had before Mr. justice DONOHUE, of the city of New York. This order having been served on the defendant, an application was made to vacate the same, on the ground that the plaintiff in the action was dead, and that no proceeding had been taken to revive the action, and, since it appeared that the execution had been issued and returned in the lifetime of the plaintiff, that, therefore, the administrator had no right under it to institute these proceedings. The motion was denied, and the present appeal taken.

S. J. Crooks, for appellant.

E. P. Bartlett, for respondent.

PER CURIAM. — The order of Mr. justice NOXON was irregular in requiring the evidence and proceedings had before the referee to be returned to him. He had the power to make the order for the examination of the defendant, and, doubtless, under section 300 of the Code, he had authority to appoint a referee. But section 292 requires that all subsequent proceedings shall be had before some justice in the judicial department where the judgment debtor resides, to be specified in the order. But the principal question on the appeal is whether, under the circumstances, the administrator of deceased plaintiff could institute these proceedings upon the execution issued and returned during the lifetime of the plaintiff. Section 283 of the former Code clearly gave him this right. But this section was repealed by chapter 417 of the Laws of 1877. But it is claimed that, since the plaintiff was, at the time of his death, entitled to invoke this remedy, the right then existing passed to his legal representative, and is preserved by the saving and qualifying provisions of the general repealing act of 1877 (*Laws of 1877, chap. 417, sec. 3*). We are of the opinion that the qualifying provisions above cited did have the effect to preserve that right, and, notwithstanding the repeal of section 283, the right which

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had accrued under it was preserved, and could still be enforced by the representative of the plaintiff, and that the order made by Mr. justice NOXON was, therefore, legal and regular, except in the direction given to the referee, which, it is apparent, was a mere oversight.

The order should, therefore, be affirmed.

U. S. CIRCUIT COURT.

THE UNION PACIFIC RAILROAD COMPANY agt. HENRY S.
McComb.

Removal of cause—When may be removed.

A suit by a corporation created by the United States, is a suit arising under the laws of the United States and may be removed under *section 2 of the act of March 8, 1875 (18 U. S. Stat. at Large, 570)*.

The mere allegation in the complaint that the plaintiff is a corporation created by act of congress, shows that the suit is one arising under the laws of the United States.

Southern District of New York, March, 1880.

Emott, Hammond & Kidder, for plaintiff.

Francis N. Bangs, for defendant.

BLATCHFORD, J. — This is a suit commenced in the supreme court of New York and removed into this court by the defendant. The plaintiff now moves to remand it to the state court. The complaint in the suit, put in in the state court, alleges that the plaintiff is a corporation created by an act of congress. The suit is brought for an accounting for certain moneys and securities alleged to belong to the plaintiff and to have been fraudulently received and converted by the defend-

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ant, and for the cancellation of a note alleged to have been wrongfully obtained from certain officers of the plaintiff by the defendant and others. The petition for removal states that the plaintiff is a corporation created by an act of congress, and that the suit and the matters in dispute therein arise under the laws of the United States. The ground on which the motion to remand is based is that the matters in dispute in the suit "in nowise concern, or are involved in, or are controlled by any of the laws of the United States, except in so far as the same may be concerned by the fact" that the plaintiff was incorporated by an act of congress.

The second section of the act of March 3, 1875 (18 *U. S. Stat. at Large*, 570), provides for the removal of a suit "arising under the Constitution or laws of the United States" by either party to such suit. This enactment is warranted by the provision of section 2 of article 3 of the Constitution of the United States that the judicial power of the United States "shall extend to all cases, in law or equity, arising under this Constitution, the laws of the United States," &c. Under the principles laid down in the decision in *Osborne agt. Bank of the United States* (9 *Wheaton*, 738, 819) it must be regarded as settled that a suit by a corporation created by the United States is a suit arising under the laws of the United States.

The allegations of the petition above recited are sufficient to show that the suit arises under a law of the United States. The case is not like that of *Gold Washing Company agt. Keyes* (6 *Otto*, 199). In that case the corporation was not one created by an act of congress, and the petition for removal, which was made by the corporation and others, did not state facts sufficient to show that the case, which was a suit against the corporation and others, arose under the laws of the United States. In the present suit the mere allegation that the plaintiff is a corporation created by act of congress, shows that the suit is one arising under the laws of the United States.

The motion to remand the suit is denied.

Woolley agt. Newcombe.

N. Y. COMMON PLEAS.

MILTON T. WOOLLEY *agt.* RICHARD S. NEWCOMBE.*Pleading on covenants—insufficiency of complaint under the Codes.*

In an action for breach of covenant of seizin, the complaint must point out the defect complained of, and tender an issue of fact to be sustained and to be met by proof.

The Codes make no exception in pleading in actions of this kind and other actions. Whatever may have been the practice before the Codes in such a case, it is now the same as other actions.

General Term, March, 1880.

APPEAL from judgment of this court at special term, entered upon dismissal of the complaint.

On the 31st of March, 1876, the respondent and his wife conveyed to the appellant, by a warranty deed, land in the state of New Jersey. The deed contained a covenant of seizin in the usual form. Without having been evicted or disturbed in his possession, the appellant brought an action averring a breach of the covenant. The answer admitted the making of the deed, and denied each and every other allegation of the complaint. On the trial, the plaintiff having put the deed in evidence, rested without any other proof. On motion the complaint was dismissed.

Richard S. Newcombe (*Albert Cardozo*, of counsel), respondent in person.

I. The common-law rules of pleading have been abolished, and the form of pleading and the rules by which the sufficiency thereof is determined, are regulated by the Code (*sec.* 518).

II. The complaint must state the facts showing a cause of action; and those facts must be proven. (*a.*) That which

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need not be proven is immaterial and might be stricken out. Could the averment of breach of the covenant be stricken out as immaterial? Clearly not; what cause of action would a complaint contain which merely showed the making of a covenant and averred no breach?

III. The answer denied the breach alleged. (a.) That is the form prescribed by the Code. The pleader could resort to no other. If it be said that such a denial would be the general issue under the old system, and that in action of covenant, the plea had to be special, the answer is, those rules no longer exist. The answer is to be tested by the rules of pleading made by the Code, and the Code authorizes a general denial of any material averment.

IV. The answer made a good issue, and the plaintiff was bound to prove the breach, unless the mere averment of a cause of action, makes out one without proof.

V. If the common-law rule of pleading prevailed, the result would be the same. (a.) The plaintiff would declare on the covenant and aver breach. (b.) The defendant would plead that he was seized, &c. (c.) The plaintiff would make replication, showing the particular defect relied upon, and the burthen would rest upon him to prove it.

VI. The plaintiff was bound to prove the breach; and failing to do so his complaint was properly dismissed (*See Ingalls agt. Eaton*, 25 *Michigan*, 32, *per* COOLY, J., *reviewing the authorities*).

VII. The judgment should be affirmed, with costs.

George H. Fletcher for appellant.

I. Unless the grantor was seized in fee, the making of the covenant by him was, at the same time, its making and its breach. This covenant is proverbial in law as attended by liabilities peculiarly its own, and not incident to any other covenant in conveyances. When a grantor covenants in his deed that he is seized in fee, &c., and the fact is that he has either a lesser estate or no estate whatever, it is reason, as well

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as settled and axiomatic law, that the covenant is broken the instant it is made, for, unless this be so, no succeeding circumstance could ever make such a breach. If the grantor has not conveyed a fee as he covenanted, he has broken his covenant by the very word; if an eviction were necessary, the grantee must suffer hardship if he must wait therefor; because, if he purchase, relying on the covenant, as he most assuredly has a right to do, then when he desires to sell he must commit a fraud by suppression of the truth, assume a clear and certain liability to come home to him any time within twenty years, or wait until he is evicted by legal process. Either event is a damage in itself; the law, therefore, justifies the reason, by declaring that the covenant of seizin, if broken, is broken the moment it is made (*Bac. Abr., title, Covenant H, P. 594, B. 595; Greenby agt. Willcocks, 2 Johns., 5; Hamilton agt. Wilson, 4 Johns., 71; McCarty agt. Leggett, 3 Hill, 134; Coit agt. Reynolds, 2 Robt., 658; Abbott agt. Allen, 14 Johns., 253*).

II. The burden of establishing the title is on the defendant, and not on the plaintiff, in an action for damages for breach of the covenant of seizin. It is a fundamental rule of practice that no party shall be called on to prove a negative; therefore, no plaintiff can be called to establish that the defendant was not seized in fee. Particularly will this be the rule where the means of proof and the knowledge of the state of the title are with the defendant. If this covenant were merely a representation and not a binding contract, and the grantor had assumed to know that the title was one in fee simple, and he was able to prove that he was ignorant of the true state of the title, even then he would be held if his representations were false. But, in this case, where by his own act the grantor has simultaneously made and broken a covenant, and taken upon himself the responsibility of his covenant being inconsistent with the facts, courts have uniformly and properly held that he must carry in a trial the burden which he has assumed, when called by the grantee so

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to do (*Bac. Abr., Covenant I, page 599, K. p. 605*; *Abbott agt. Allen, 14 Johns., 253*; *Potter agt. Kitchen, 5 Bosw., 566*; *Rawle on Covenants for Title [4th ed.], p. 84*; *Suaford agt. Whipple, 3 G. Green [Iowa], 264*). Since the earliest times it has been uniformly the rule that, in actions of this sort, the burden of proof as to the breach of the covenant is upon the defendant, and not upon the plaintiff. That this remains the rule the above cases sufficiently establish.

III. The measure of damages in this action was the consideration-money paid. This the consideration clause of the deed completely established. It was for this purpose that the deed was offered in evidence by plaintiff solely upon the question of damages (*Pitcher agt. Livingston, 4 Johnson, 1*; *Rawle on Covenants, 4 ed., p. 237*; *Sedgwick on Damages, 181*).

IV. The plaintiff has made a full case upon the pleadings and proofs entitling him to judgment for the sum of \$6,000. The making of the covenant is not only admitted but proved by the deed, and the amount of the damages being regulated by the amount of the consideration-money that is determined by the deed also.

V. The defendant has, by his motion to dismiss, stipulated to abide by the case as it stands. He claimed he was hereby entitled to judgment. The plaintiff claimed he was thereby entitled to judgment for \$6,000. The plaintiff desires no new trial. The defendant cannot ask for one. If he has failed he is not in any position to do else than to fail utterly. The motion for judgment in favor of plaintiff should have been granted. Under the exception taken it should now be granted (*Potter agt. Kitchen, 5 Bosw., 566*). If, therefore, the court concludes that the motion to dismiss was improperly granted, then the motion for judgment was improperly denied and this court cannot direct a new trial in order to confirm the rights of plaintiff, which can and ought to be fixed by granting the motion for judgment in favor of the plaintiff.

VI. This judgment should be reversed and judgment abso-

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lute, upon the pleadings and proofs, should be granted to plaintiff for the sum of \$6,000.

J. F. DALY, J. — It has been held in this state that in an action for the breach of the covenant of seizin in a deed of land, the plaintiff in his complaint may assign the breach by simply negativing the words of the covenant, and if the answer aver the contrary, *i. e.*, that the defendant was the true and lawful owner, in the exact words of the covenant, the defendant holds the affirmative of the issue and the burden of proof, and must prove his title (*Potter agt. Kitchen*, 5 Bosw., 566; *Abbott agt. Allen*, 14 J. R., 248).

The supreme court of Michigan (*Ingalls agt. Eaton*, 25 Mich., 32) has decided, however, that where, in such an action, the breach is assigned in general terms and the defendant pleads the general issue, the mere production of the deed is not sufficient to maintain a recovery by the plaintiff, and does not cast upon defendant the burden of proving his title.

The opinion of COOLEY, J., delivered in the case, shows that the decision is not put upon the distinction in the pleas but upon grounds which assail the authority of the cases above cited in this state.

The whole question depends upon the sufficiency of the complaint under the Code, a question still open and which should be now determined, because if we reverse this judgment upon the authority of *Potter agt. Kitchen* a new trial must be ordered and defendant can, and of course will, take the objection at the next trial that the complaint does not state facts sufficient to constitute a cause of action, a right reserved to him, although he has not demurred (*Code*, sec. 499).

A doubt as to the sufficiency of the complaint in the form presented in this action and in *Potter agt. Kitchen*, was started in the latter case in the opinion written by SLOSSEN, J., and concurred in by HOFFMAN and WOODRUFF, JJ. He says: "Since the Code, every complaint must contain a statement of the facts constituting the cause of action. Whether

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an allegation of want of title in the defendant is an averment of a fact or of a conclusion of law, I will not stop to imagine, since the objection to the sufficiency of the complaint was neither taken by demurrer nor on the trial. Had such an objection been taken, it might have presented, perhaps, a question of some difficulty (*Lawrence agt. Wright*, 2 *Duer*, 673 ; *Schenck agt. Naylor*, *id.*, 675).

The first of the cases cited by the learned justice holds that, in an action to recover the possession of real estate, the facts set forth in the complaint must show that the plaintiff has a legal title to the premises in question; the mere averment that he has such a title is insufficient; that the facts which the Code requires to be set forth are not true propositions, but physical facts, capable, as such, of being established by evidence, oral or documentary. The case of *Schenck agt. Naylor* holds that, in an action to recover damages for the breach of a covenant, if the complaint does not show, either by express words or by a necessary implication, that the covenant is broken by defendant, it is bad upon demurrer; and that the defect is not cured by a general allegation that the acts set forth were "a violation of defendant's covenant," for these words aver only a conclusion of law, and are irrelevant and nugatory if the conclusion is not justified by any facts stated in the complaint.

In actions to recover the possession of property distrained doing damage, an answer that the defendant, or the person by whose command he acted, was lawfully possessed of the real property, upon which the distress was made, shall be good without setting forth the title (*Code of Procedure*, sec. 166). But this is the only exception to the rule that facts, and not conclusions of law, must be pleaded. (*Code*, secs. 481, 500). So that, although the action upon the covenant of seizin was, under the old practice, exceptional in that all the plaintiff need allege was a breach of the covenant, by simply negating the words of it, the Code makes no exception in such an action, the plaintiff being required, in all cases, to set forth

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in his complaint "a plain and concise statement of the facts constituting such cause of action, without unnecessary repetition."

But it is said, in the authorities cited in *Potter agt. Kitchen*, that this action on the covenant of seizin is exceptional, also, in that the defendant has the affirmative of the issue in all cases, because the plaintiff cannot be required to prove a negative, *i. e.*, that defendant had no title, and besides is not presumed to know the exact condition of his grantor's title, who is not bound to explain it except by suit (*Abbott agt. Allen, supra*). However good these reasons may be, or may have been when first suggested, for casting the onus of proof on defendant, and, consequently, of permitting plaintiff to aver a mere conclusion of law, the legislature, in framing the Codes, considered that they had lost what force they possessed, and concluded, therefore, to make no exception, as to pleading and proof, between this and other actions. In these days of the recording acts, when conveyances, constituting the grantor's chain of title, are notice to the whole world, and the presumption that the grantee does not know that title, is hardly to be entertained, the legislature has deemed it proper to require the grantee to point out the defect he complains of, and tender an issue of fact to be sustained, and to be met by proof. It is certain that the system of pleading established by the Codes permits no such thing as a *recovery without pleading or proving a single fact*, and yet this was the rule in actions of this character, before the Codes, for, under the pleadings, if neither party gave any evidence, the plaintiff was entitled to recover.

I am in favor, therefore, of affirming this judgment dismissing the complaint, because no facts are averred constituting a cause of action.

VAN BRUNT, J., concurred.

Kelly agt. Devlin.

SUPERIOR COURT.

WILLIAM KELLY agt. ANNA C. DEVLIN, administratrix, &c.,
and others.

New York (city of)—contracts with department of public works—secret partnerships in such contracts illegal.

An account stated, the amount agreed upon, and a promise to pay, furnish good grounds for an action at law, but no basis for a bill in equity instituted for the purpose of establishing a partnership and for an accounting.

Although, as a general proposition, the legislature of a state is alone competent to make laws, it is well settled that it is competent for the legislature to delegate to municipal corporations the power to make laws and ordinances ; which, when authorized, have the force, as to persons bound thereby, of laws passed by the legislature itself.

Where the authority of the commissioners of public works to make and enter into contracts for the defendant, "the mayor, aldermen and commonalty of the city of New York," was conferred by chapter 335 of the Laws of 1873, commonly known as the city charter, which, among other things, provided that all contracts to be made or let for work to be done, or supplies to be furnished, shall be made by the appropriate heads of this department, under such regulation as now exist or shall be established by ordinance of the common council ; the ordinance contained a provision that every proposal for work should contain the names of all persons who are interested, and prohibits any secret agreement or understanding that any person not named should become interested in any contract :

Held, that a secret partnership made by two persons that they were to be equally interested in the contract for the work obtained by one of the two partners, is illegal, being against public policy, and contrary to positive law.

Special Term, December, 1879.

THE action is in equity and complains that on the 10th day of April, 1877, and prior thereto, the plaintiff and Charles P. Devlin were partners in business, doing work for the city of New York and for private parties, and continued as such to the time of the death of the latter. That part of the said business was the obtaining, executing and performing, in the

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name of the said Charles P. Devlin, of orders and contracts by and with the department of public works in the city of New York, being an executive department of the defendant, the mayor, aldermen and commonalty of the city of New York, a municipal corporation duly organized and existing by the laws of the state of New York, under an agreement whereby the said contracts and order were to be obtained by the said Charles P. Devlin, in his name, and were to be executed and performed by him and the plaintiff, or one of them, upon such terms and conditions, in respect to each contract, as should be mutually agreed upon.

That the said Charles P. Devlin died on the 1st day of June, 1878, leaving his widow, the defendant Anna C. Devlin, who was duly appointed on the 3d day of June, 1878, administratrix of the goods and chattels of which he died possessed.

That on the 12th day of April, 1877, an accounting and settlement was had between the plaintiff and the said Charles P. as to all contracts, orders and work theretofore executed and performed, upon which it was mutually agreed by and between them that there was then due and owing by the said Charles P. to the plaintiff the sum of \$2,500 upon contracts, orders and work theretofore executed and performed, which amount the said Charles P. promised and agreed to pay to the plaintiff.

A detailed statement is set forth of the several orders and contracts — not here necessary to repeat — which it is claimed that the said Charles P. had obtained, by and with the department of public works, in his name, and which were performed by him and the plaintiff, or one of them, and the complaint demands a judgment that the partnership be established and that all the moneys remaining unpaid on any of the contracts and orders, and all the moneys paid on any of the said orders and contracts to the defendants, Anna C. Devlin, administratrix, &c., Charles Devlin and John B. Devlin, or any of them, be declared to be assets of the partnership theretofore existing between the plaintiff and Charles P., deceased; that an account be taken of the transactions of the partnership; that

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any and all debts of the partnership be first paid out of the assets, and that the plaintiff recover such amount as shall on such accounting be found to be due to him out of the surplus.

Defendants, Anna C., John B. and Charles Devlin answer separately, and substantially deny the allegations in the complaint.

E. R. Dodge (*Nelson J. Waterbury*, of counsel), attorney for plaintiff.

John H. Strahan, attorney and of counsel for John B. Devlin.

R. S. Newcombe and *Albert Cardozo*, of counsel for Anna C. Devlin and Charles Devlin.

SPEIR, J. — The point first presented in this case, assuming that the partnership, such as is alleged in the complaint, was in fact made or entered into, is: Was the original arrangement for a joint interest or copartnership illegal and contrary to positive law?

The authority of the commissioner of public works to make and enter into contracts for the defendant, the mayor, aldermen and commonalty of the city of New York, was conferred by chapter 335 of the Laws of 1873, commonly known as the city charter. By the seventy-first section, this department of public works shall have cognizance and control of paving, repairing and repaving streets, and keeping the same free from obstruction; by section 91, all contracts to be made or let *for work to be done*, or supplies to be furnished, shall be made by the appropriate heads of this department, under such regulation as now exist, or shall be established by ordinance of the common council.

These ordinances provide, *inter alia*, that such person offering for the work should make out his estimate which he was to deposit in a box provided by the department for that pur-

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pose ; the name and place of residence of the person making the same ; the names of all persons interested with him therein ; and if no other person be interested it shall distinctly state the fact.

The ordinance further provides that the estimate should be verified by the oath, in writing, of the party making the same, that the several matters stated therein were, in all respects, true.

As required by the ordinance, Charles P. Devlin, when estimating for the work of paving the streets, swore that he alone was interested in the bids or proposals, and that if he obtained the contracts for the work no individual other than himself would have an interest in such contracts. He was the lowest bidder for the work and, pursuant to the requirements of the statute and ordinance of the city, the contracts were awarded to him.

The complaint is framed upon the idea that the partnership was a secret one and concealed from the department of the city authorized only to make these contracts under the provisions of law.

The agreement between the plaintiff and Charles P. Devlin, deceased, positively asserted that the deceased was to obtain contracts *in his name only* to be executed and performed by him and the plaintiff, or one of them, upon such terms and conditions in respect to each contract as should be mutually agreed upon. The contract was illegal.

The first step in the plaintiff's case was to prove that he was a secret partner and entitled to a share of this money. The obligation arises out of the contract of partnership itself. The ordinance prohibits secret partners, and the plaintiff, therefore, is not a partner. The object of the ordinance was to enable the department of public works to know with whom it contracted and, also, to see that certain officers of the city government should not become interested in procuring lucrative contracts for themselves and friends, and to prevent all secret combinations in relation to obtaining work. These

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contracts were to be given to the lowest bidder. The provision that every proposal for work shall contain the names of all persons who are interested, and prohibits any secret agreement or understanding that any person not named shall become interested in any contract that may be made, was intended to deprive the people of honest competition which public bidding is designed to secure.

Although, as a general proposition, the legislature of a state is alone competent to make laws, it is well settled that it is competent for the legislature to delegate to municipal corporations the power to make laws and ordinances, which, when authorized, have the force, as to persons bound thereby, of laws passed by the legislature itself. In the present case such authority was delegated by an act of the legislature to the defendant corporation, the mayor, aldermen and commonalty of the city of New York (*Dillon on Municipal Corporations*, sec. 245 and authorities cited; *The Brick Church agt. The Mayor, &c.*, 5 Cow., 541; *McDermot agt. The Board of Police*, 5 Abbott, 422). The rule has been applied to a statute of similar import passed by the legislature of this state (*Laws of 1854, chapter 329*) and has received the judicial sanction of the highest court. In the case of *Woodworth agt. Bennett* (43 N. Y., 273), it was held that a secret partnership made by four persons that they were to be equally interested in the contract for the work obtained by one of the four partners, that such partnership was illegal, being against public policy.

There is an admission in the complaint that one of the objects of invoking the aid of the court was "to have the partnership established," and the accounts taken; and a concession on the part of the plaintiff that he and the deceased could not in his lifetime agree upon the accounts. I am unable to find any evidence of any agreement between the parties fixing the terms and conditions between them upon which any of the contracts or orders obtained by Charles P. Devlin were to be executed by them or by one or the other. It is true there was an accounting at Barry's office in April,

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1877, in which it appears to have been agreed that there was due to the plaintiff \$2,500, and that Mr. Devlin would give that sum in settlement. But the accounts as produced, utterly failed to show a partnership between the parties. The witness Barry did testify that there was an account stated and the amount agreed upon was \$2,500, but he distinctly states that the accounts produced (which were for the purpose of proving a partnership) were wholly unintelligible to himself and the parties present incapable of explaining them further than agreeing that a sum was due to the plaintiff, and the deceased, Mr. Devlin, agreeing to pay the plaintiff the amount in settlement.

An account stated, the amount agreed upon, and a promise to pay, furnish good grounds for an action at law, but no basis for a bill in equity instituted for the purpose of establishing a partnership and for an accounting.

The defendants are entitled to judgment.

COURT OF APPEALS.

EDMUND PHINNEY and others agt. EDMUND BROSCHELL and others.

Order for publication of summons — must be made by a judge out of court — Caption of an order not controlling as to its character — when an order entitled at special term may be shown to have been made out of court.

Where a warrant of attachment having been granted against the property of the defendants as non-residents, an order was obtained for the service of the summons by publication which was entitled, "At special term of the supreme court of the state of New York, held at chambers. Present, hon. ABRAHAM R. LAWRENCE, justice;" it recited: "The plaintiffs having presented to me the verified complaint in this action, * * * and having also made proof to my satisfaction that said defendants are not residents of this state;" it was signed "Enter. A. R. L., J. S. C." It did not appear that the order had ever in fact been entered as a court order, but it was shown that the order was in fact made and signed out of court, in the judge's private room:

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Held, that it was good as a chambers order of the judge, and a service of the summons by publication in pursuance thereof was effectual (*Affirming S. C.*, 19 *Hun*, 116).

The caption of the order and the direction to enter are not conclusive as to its character, but the court will look at the facts as proved by the papers to exist to determine its character.

April, 1880.

A WARRANT of attachment having been granted against the property of the defendants as non-residents, an order was obtained for the service of the summons by publication. The order was entitled, "At a special term of the supreme court of the state of New York, held at chambers. Present: hon. ABRAHAM R. LAWRENCE, justice." It recited: "The plaintiffs having presented to me the verified complaint in this action, * * * and having also made proof to my satisfaction that said defendants are not residents of this state." It was signed "Enter. A. R. L. J. S. C." It did not appear that the order had ever in fact been entered as a court order.

The defendants, appearing for the motion only, moved to vacate the attachment on the ground that the order for publication was made by the court and not by a judge (*Code Civil Proc.*, sec. 440), and relied on the case of *Hershon agt. Knickerbocker Life Insurance Company* (*Albany Law Journal*, June 7, 1879).

The plaintiffs showed, in opposition to the motion, that the order was in fact made and signed out of court, in the judge's private room.

The motion to vacate was granted at special term. The plaintiffs appealed to the general term, where the order of the special term was reversed, and the motion denied (19 *Hun*, 116). The defendants thereupon appealed to the court of appeals.

E. R. Olcott and *J. F. Mosher*, for plaintiffs.

Coudert Brothers and *Edward Patterson*, for defendants.

Mojarietta *et al.* agt. Saenz *et al.*

RAPALLO, J.—The appellants claim that the order of publication in this case was not made by a judge, but by the court at special term, and was, therefore, void. This is the only point in the case. It appears that the order was, in fact, made by judge LAWRENCE, out of court, in his private chambers. His name appears in the caption, and in the body of the order it purports to be made by a judge. It recites, "the plaintiffs having presented to me," &c., and "having proved to my satisfaction," &c., ordered, &c. It is signed by the judge with his initials, and his official title is abbreviated. The appellant relies on the fact that it has a caption, "At a Special Term held at Chambers," and that there is a direction to enter; but it does not appear to have been in fact entered as a court order. The general term held that it was good as a chambers order of the judge. The question is purely one of form, and we are not inclined to differ with the court below on such a technical point of practice.

Order affirmed, with costs.

All concur, except ANDREWS, J., absent.

COURT OF APPEALS.

AGUSTIN H. MOJARIETTA *et al.* agt. THOMAS SAENZ *et al.*

Order for publication of summons—must be made by a judge out of court—not void by reason of caption and direction to enter—may be amended.

Where an order had been made for the service of the summons by publication, which order was similar in all respects to that in *Phinney agt. Broschell* (*ante*, 492), but it did not appear, as in that case, that the order had been made in the judge's private chambers:

Held, that it was not void by reason of its having a caption and a direction to enter, but could be treated as the order of a judge.

Held, also, that the order might be amended, on motion, after it had been acted upon, by striking out the superfluous portions.

April 1880.

Mojarietta et al. agt. Saenz et al.

AN order had been made for the service of the summons by publication, which order was similar in all respects to that in *Phinney agt. Broschell* (*ante*, 492). It did not, however, appear as in that case, that the order had been made in the judge's private chambers.

The plaintiffs, on notice, moved to amend the order by striking out all of the caption preceding the words "at chambers," and the direction "enter," before the judge's signature at the foot of the order.

The motion was denied at special term, on the ground that the court had no power to make the amendment.

The plaintiffs appealed to the general term, where the order of the special term was reversed, and the motion granted, without costs. The defendants thereupon appealed to the court of appeals.

E. R. Olcott and *J. F. Mosher*, for plaintiffs.

Edward Patterson, for defendants.

RAPALLO, *J.* — The order of publication appears in its body to be made by a judge, reciting that the application was made to him, and the necessary proof was made to his satisfaction. As we have just held in the case of *Phinney agt. Broschell*, it was not void by reason of its having a caption and a direction to enter, but could be treated as the order of a judge. We see no objection to the court allowing it, after it had been acted upon, to be amended by striking out the superfluous portions.

The appeal should be dismissed.

All concur, except ANDREWS, *J.*, absent.

Matter of the estate of Cohen.

SURROGATE'S COURT.

In the Matter of the estate of MOSES S. COHEN, deceased.

Surrogate of New York — His jurisdiction to vacate, modify and rescind orders obtained by fraud.

The jurisdiction to vacate, modify and rescind orders in cases where the court has been imposed upon, is exercised by the supreme court without question as to its right and authority so to do.

The same power is conferred upon the surrogate of the city of New York by section 1 of chapter 859, Law of 1870, which provides that "the surrogate of this county has jurisdiction to set aside, open, vacate or modify the orders and decrees of this court with the same power as is exercised by courts of record of general jurisdiction."

Accordingly, where, on application to the surrogate for an order vacating and setting aside two orders, one of which accepts the resignation of D. B. as general guardian of minors and discharging him from his trust as such guardian, and the other of said orders releasing said guardian and his sureties from all future liability upon his official bond and for other and future relief:

Held, that it appearing to the satisfaction of the surrogate that the orders were procured from his predecessor by false statements made under oath, by a false receipt, by the suppression of facts and by deception practiced upon the court that they should be revoked because of the fraud.

Held, further, that the accounting of the general guardian and the orders made thereon present no bar to a proceeding to vacate them for fraud under the act of 1870.

Ex-Judge Cardozo and Richd. S. Newcombe, for petitioners.

McDaniel, Lummis & Souther, for respondent Andrade.

Albert Bach, for respondent Rachel Beurimo.

B. T. Enistein, for respondent Emanuel Hoffman.

George A. Baker, for respondent Angel H. Jacobs.

Kitchell & Jelliffe, for respondent Abraham Beurimo.

County of New York, March, 1880.

Matter of the estate of Cohen.

CALVIN, *Surrogate*.— An application was made on the 19th day of November, 1877, by the administrator, &c., of Estelle Cohen, deceased, daughter of the above-named intestate, and by the special guardian of Daniel Cohen, Emma Cohen and Martha Cohen, the three minor children of said decedent, for an order vacating and setting aside the two orders made in the matter of the said estate, one of which orders is dated November 30, 1874, and accepts the resignation of Daniel Beurimo, as general guardian of said minors, and discharges him from his trust as such guardian and the other of said orders is dated December 3, 1874, and releases said guardian and his sureties from all future liability upon his official bond, and for other or further relief.

Upon the return of the order to show cause, issued upon said application, such proceedings were had, that an order of reference was made, whereby the referee therein named was authorized and directed to take proof of the facts and circumstances charged in the said application and of the matters material to the issues joined by the petition and answers, and to report the proofs taken by him, with his opinion thereon, to this court.

The referee so appointed filed his report on the third day of June, 1879, together with the testimony taken by him, and also filed a supplemental report on the 19th day of June, 1879.

These two reports contain twenty separate and distinct findings of fact, but the said referee has not given what may technically be called an opinion; but he, without doubt, considered that his report upon the facts and circumstances of this case, as found in and by his said reports, sufficiently indicated what his opinion was in the matter.

All the testimony taken by the said referee having been returned by him with his said reports, it would seem to be immaterial whether the referee has actually given a technical opinion, as directed by the said order of reference, or not, for the reason that I have all said evidence before me and am enabled to form my own conclusions therefrom, as well without the opinion of the said referee as with it.

Matter of the estate of Cohen.

I have very carefully considered the said testimony and the briefs submitted by the respective counsel and am clearly of the opinion that all of the said findings of the said referee are fully sustained by the testimony returned by him with his said report, and particularly that the said two orders above referred to were procured from my predecessor by false statements made under oath, by a false receipt, by the suppression of facts and by deception practiced upon the court, with all of which findings I fully concur, and without recapitulating the said testimony, I proceed to the consideration of the questions put in issue by the petition and answers herein.

I entertain no doubt of my authority to vacate said orders under the power conferred upon me by the Session Laws of 1870, chapter 359, section 1, whereby the surrogate of this county has jurisdiction to set aside, open, vacate or modify the orders and decrees of this court with the same power as is exercised by courts of record of general jurisdiction.

The jurisdiction to vacate, modify and rescind orders in cases where the court has been imposed upon, is exercised by the supreme court without question as to its right and authority so to do (*In re Foster on Petition of Whittlesey*, 15 Hun, p. 387).

It, therefore, follows that the point taken by the counsel for Andrade, that the accounting of Daniel Beurimo, and the orders made thereon work an estoppel is not tenable, except to this extent, that while said orders remain in full force they are conclusive, but in a proceeding to vacate them for fraud under the said act of 1870 they present no bar to such proceeding.

Having arrived at the conclusion that the said orders should be revoked because of the fraud in which they were conceived, it seems to follow that the letters of guardianship issued to Abraham Beurimo should also be revoked, and he removed from his trust, for the reason that he, knowingly, participated in the deception practiced upon the court in the proceeding in which said orders were made allowing Daniel Beurimo to resign his trust as guardian and discharging his sureties.

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A point is also raised that some of the evidence of Abraham Beurimo is incompetent, under section 829 of the Code, he having testified that the receipt given by him to Daniel Beurimo was not true; but it is contended by the counsel for the petitioner that the testimony in respect to said receipt was not such a transaction as that contemplated by said Code, and that no one can raise that objection except the administratrix of the estate of said Daniel Beurimo, deceased, or a survivor of said Daniel who did not object; I am, therefore, inclined to the opinion that said testimony was properly taken and should remain in the case, and that no objection was made to its reception by a party having a right to interpose the provisions of said Code; but, however this may be, I am clearly of the opinion that the books of D. & A. Beurimo, which were duly introduced and received in evidence, without objection, prove the petitioner's case without reference to the testimony of Abraham Beurimo as to the falsity of the receipt given by him, for it appears, from said books, that tobacco and not United States bonds was passed over by Daniel to Abraham and there can be no pretense that both tobacco and United States bonds were handed over by Daniel to Abraham.

The petitioners pray that an account be taken of the matters of the said guardianship of said Daniel Beurimo, and that an order may be made that the administratrix of Daniel Beurimo pay the amount found due, and in default thereof that the bonds executed by said Daniel Beurimo as such guardian and his sureties be delivered up and assigned to said petitioners for prosecution.

After carefully examining all the papers submitted to me in this matter, I can see no necessity for any further accounting on behalf of Daniel Beurimo or his estate, for the reason that it would create an unnecessary expense, and for the controlling reason that the correctness of the account filed by him in the proceedings in which said orders were made, has not been questioned by any one. In that account he showed

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the true amounts with which he was chargeable in his guardianship of each of said minors.

The accounting was therefore correct, right and proper. It was the false statement to the effect that he, Daniel, had delivered to Abraham the estates of his several wards in cash and United States bonds, and the equally false statement in the receipt of said Abraham, that he had received from said Daniel the said estates, in cash and United States bonds, which constituted the fraud. It was these falsehoods that induced the surrogate to grant the said orders which are now sought to be set aside.

It appears, by the account filed by said Daniel Beurimo in the proceeding in which he applied to be released from his trust as guardian, and in which the aforesaid orders were entered, that he claimed to have on hand to the credit of the estate of his ward, Martha Cohen, United States bonds amounting to..... \$6,350 00
And in cash the sum of..... 325 24

In all \$6,675 24

Also for his ward, Daniel M. Cohen, United States bonds amounting to \$5,850, and in cash \$291.75 ;
in all 6,141 76

Also for his ward, Emma Cohen, United States bonds amounting to \$5,950, and in cash \$298.45 ;
in all 6,248 45

And also for his ward, Sarah Cohen, United States bonds amounting to \$5,850, and in cash \$291.76 ;
in all 6,141 76

\$25,207 21

And that he also had on hand, to the credit of the estate of his late ward, Estella Cohen, then deceased, and belonging to the legal representatives of her estate, the sum of about..... 7,000 00

Showing a total amount in his hands to the credit of the estates of his said wards..... 32,207 21

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Without reference to the market value of said United States bonds at the time of such accounting, I have no doubt but that said account is approximately correct, and very accurately shows the aggregate amount of his liability to the estates of his said wards.

It also appears from the testimony, that said Daniel Beurimo transferred, or rather attempted to transfer, 292 cases of tobacco to said Abraham Beurimo, on account of the moneys due from him to the estates of said minors; that, at the time of such transfer, the firm of D. & A. Beurimo was insolvent; that, upon a sale of said tobacco, the sum of about \$23,000 was realized therefor; that proceedings in bankruptcy were instituted, wherein an assignee was appointed; that said assignee claimed that said tobacco belonged to said firm, and demanded that the entire proceeds of said sale should be paid over to him, insisting that the aforesaid transfer was fraudulent and void; that thereupon certain compromise proceedings were commenced in this court, wherein an order was made allowing the compromise to be made upon the terms proposed, by virtue of which the said assignee was authorized to receive the whole of said proceeds, except the sum of \$8,202.75, which was, by the provisions of said order of compromise, to inure to the benefit of said minors.

It is, therefore, to be presumed that said compromise was for the best interests of said minors as it had not only the sanction of all the parties in interest, but also the approval of the surrogate.

I have already considered my jurisdiction over the said orders and my authority to vacate or modify the same under the act of 1870, as above stated, and Mrs. Rachel Beurimo, the widow of Daniel Beurimo, deceased, and the administratrix of his estate having been made a party to these proceedings, and having duly appeared herein and submitted herself to the jurisdiction of this court, I am clearly of the opinion that I am empowered to make and enter the order asked for in the petition herein.

Matter of Gibbs.

An order or decree should, therefore, be made herein, revoking and setting aside the said orders of November 30, 1874, and of December 3, 1874, settling the account of said Daniel Beurimo as such guardian, in accordance with the account filed by him on or about the 30th day of November, 1874, crediting him with the sum of \$8,205.75, so received from the proceeds of tobacco, as above stated, and upon a proper adjustment of the interest account between the said Daniel Beurimo, or his estate, and the estates of the said minors and that said petitioners should be at liberty to prosecute the official bonds of said Daniel Beurimo.

An order drawn in conformity to the views above expressed may be presented for settlement upon three days' notice.

SUPREME COURT.

In the Matter of the application of MINERVA C. GIBBS for surplus moneys arising under a statutory foreclosure.

Surplus moneys — application for distribution of — Costs.

Proceedings under chapter 804, Laws 1868, for the recovery of surplus moneys arising upon mortgage foreclosures by advertisement are special statutory proceedings.

Successful claimants may, in the discretion of the court, be allowed costs under chapter 270, Laws 1854, at the rate allowed for similar services in civil actions.

Proceedings for the recovery of surplus moneys arising upon foreclosures by action are proceedings in the action, and are similar to proceedings under chapter 804, Laws 1868. When costs are allowed, they must be at the rate allowed in proceedings for the recovery of surplus moneys arising upon foreclosures by action, *i. e.*, necessary disbursements and motion costs.

Chenango adjourned Special Term, March, 1880.

George M. Tillson, for motion.

Smith Brothers, opposed.

Matter of Gibbs.

FOLLETT, *J.*—Chapter 804, Laws 1868, requires that surplus moneys arising upon statutory foreclosures be paid to the clerk of the county in which the premises sold are situated. By this statute persons claiming the surplus are authorized to file claims to the fund with the clerk, and apply at a special term for a reference to ascertain and report the several liens upon the fund, their priorities, and the amount due the claimant and all others. Notice of the application must be served upon all persons upon whom the notice of sale was served, and upon all persons filing claims. The notice must be served in the same manner that a summons for the commencement of an action is served, and the same proof of service must be made (*sec. 3, chap. 804, Laws 1868*). Under a statutory foreclosure, occurring since this statute, a surplus was paid to a clerk. Two persons filed claims, each claiming one-half of the fund, and one obtained a reference. Both claimants and a judgment creditor appeared on the reference. The judgment creditor contested the liens of the claimants, but was defeated, each claimant being awarded one-half of the surplus. The claimant who instituted the proceedings moves that the report be confirmed, which is not contested, for his disbursements, which are not contested, and for costs under the Code as in an action, claiming the following items:

Two dollars for each additional person necessarily served, not exceeding ten.....	\$20 00
One dollar for each person necessarily served in excess of ten	13 00
For all proceedings before notice of trial	25 00
For all proceedings after notice and before trial....	15 00
For the trial of an issue of fact	30 00

The contesting claimant concedes that twenty-four persons were necessarily served with notice of the application for reference, but insists that only the disbursements and the costs for the two motions can be allowed.

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This proceeding is a statutory remedy in addition to the remedy by action which latter undoubtedly may be resorted to in case of conflicting rights. It is, beyond controversy, a special statutory proceeding instead of an action. A statutory foreclosure is not an action (*Hall* agt. *Bartlett*, 9 *Barb.*, 300). "In special proceedings, and on appeals therefrom, costs may be allowed in the discretion of the court, and when allowed, shall be at the rate allowed for similar services in civil actions" (*sec. 3, chap. 270, Laws 1854*).

I am of the opinion that in this proceeding costs are allowable, and only allowable by virtue of the above-quoted section. In this case, the court, in the exercise of its discretion, allows the claimant costs, and the only question is, as to the amount.

In proceedings for the recovery of surplus moneys it is settled, at least in the first and third departments, that only disbursements and motion costs are allowable (*McDermott* agt. *Hennesy*, 9 *Hun.*, 59; *Wellington* agt. *The Ulster County Ice Co.*, 5 *N. Y. W. Digest*, 104; *Hebrank* agt. *Colell*, 2 *N. Y. Monthly Law Bulletin* p. 39). Notwithstanding the dictum in *Elwood* agt. *Robbins* (48 *How.*, 108), I think proceedings for the recovery of surplus moneys arising under foreclosures by action are not special proceedings but are proceedings in the action (*Mutual Life Ins. Co.* agt. *Bowen*, 47 *Barb.*, 618). The proceedings in this case are more nearly similar to proceedings for the recovery of surplus moneys arising under foreclosures by action, than they are to actions. Except in the single particular of the service of the notice of application for a reference, the proceeding in both cases to obtain surplus moneys, are identical. Indeed, the statute expressly makes them so. "Except, as herein otherwise provided, all proceedings under this act shall be such as are prescribed from time to time by the supreme court relative to the surplus moneys and the distribution thereof, which have arisen upon sales ordered by that court" (*sec. 4, chap. 804, Laws 1868*). Under section 3, chapter 270, *Laws 1854*, authorizing the allowance of costs, "at the rate allowed for

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similar services in civil actions," the rate prescribed in *McDermott* agt. *Hennessy* and *Wellington* agt. *The Ulster County Ice Co.* (*supra*), must prevail.

The moving claimant is allowed ten dollars for her motion for the reference, and ten dollars for her motion for confirmation and disbursements, payable out of the fund.

COURT OF APPEALS.

AGUSTIN H. MOJARIETTA and another agt. THOMAS SAENZ and others.

Attachment — omission to publish summons — Second attachment — same affidavit used on application for — regularity of.

Where an attachment was granted May 13, 1879, the time to commence publication expiring on 12th June, the publication not having been made until after that date:

Held, that, by that omission the attachment fell.

The requests of the defendant to suspend proceedings, received June fifth, by telegraph, and June twelfth, by letter, were not a substitute for service of the summons or commencement of publication, nor can they operate as an estoppel to preclude the defendants from setting up want of publication of service.

A mere request to suspend legal proceedings is not sufficient to place the party who complies with it in the same position as if he had gone on with them.

On the 12th of June, 1879, the plaintiffs applied for and obtained a second warrant of attachment, using for the purpose the same summons, complaint and affidavit, upon which the first warrant had been granted, but giving a new undertaking.

Held, that, as the thirty days had not expired when the second attachment was granted, the granting of the warrant gave the plaintiffs thirty days from that time to commence publication.

It seems questionable whether the lapse of thirty days without publication of the summons ousts the jurisdiction of the court or abates the action, or merely avoids the attachment.

It seems there is no reason why a plaintiff, after having obtained one warrant of attachment and order of publication, may not abandon then

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and take out a new attachment and order, provided this course is not pursued for the mere purpose of vexation, in which case he would be liable for the damages unnecessarily occasioned.

Several attachments may be issued in the same action to different counties, and if one should be defective or fail for any reason, there is nothing which prohibits an application for a new one.

It is no objection that the same affidavit was used on the application for the second attachment which had been used on the application for the first.

The objection that Rule 25 was not complied with by showing whether any former application had been made, if founded in fact, would be a mere irregularity which, if not regarded in the court below, would not be regarded here. Moreover, it is not specified in the notice of motion, and for that reason was not available to the appellants.

April, 1880.

E. R. Olcott and J. F. Mosher, for plaintiffs, respondents.

Edward Patterson, for defendants, appellants.

THIS action was brought to recover a balance of account.

On May 13, 1879, a warrant of attachment was granted against the property of the defendants by Mr. justice DONOHUE. The time to commence publication under the Code expired on June twelfth. A levy was made only on the individual property of L. A. Rodriquez, one of the defendants, and a few days afterwards the plaintiffs informed the defendants, by letter, of the attachment and levy.

On June fifth the plaintiffs received, in reply to their letter, the following telegram from the defendant L. A. Rodriquez: "Suspend proceedings—I write." The letter of Rodriquez, referred to in this telegram, was received by the plaintiffs on June twelfth.

The telegram was handed by the plaintiffs to their attorney, who had already obtained an order for publication and were on the point of publishing the summons, but on receipt of the telegram they determined not to publish immediately.

They erroneously supposed that the thirteenth would be

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the last day to commence publication. Discovering their error on the afternoon of the twelfth they presented the original affidavit, warrant of attachment, summons and complaint and a new undertaking to judge LAWRENCE, sitting in chambers during that month, and laid before him all the facts, whereupon he granted a second warrant.

There had been no change in the accounts between the parties in the interval between the application for the first and second attachments. Under the first order of publication copies of the summons and complaint were mailed on June twelfth and publication commenced on June thirteenth, and afterwards completed.

A second order of publication was obtained in due time, after the granting of the second attachment, and service thereunder perfected.

The defendants, appearing for the purposes of the motion only, moved to vacate both attachments. The motion was denied at special term and the order affirmed at general term, whereupon they appealed to the court of appeals.

RAPALLO, J.—The first attachment was granted May 13, 1879. The last day for commencing publication of the summons is conceded to have expired on the 12th June, 1879. No publication was made until after that date, and by that omission the attachment fell (*Code, sec. 638; Taylor agt. Troncoso, 76 N. Y., 599*).

The requests of the defendant Rodriguez to suspend proceedings received June fifth by telegraph and June twelfth by letter were not a substitute for service of the summons or commencement of publication, nor can they operate as an estoppel to preclude the defendants from setting up want of publication or service. A mere request to suspend legal proceedings is not sufficient to place the party who complies with it in the same position as if he had gone on with them. The motion to vacate the first attachment should, therefore, have been granted.

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On the 12th of June, 1879, the plaintiffs applied for and obtained a second warrant of attachment from Mr. justice LAWRENCE, using for the purpose the same summons, complaint and affidavit upon which the first warrant had been granted, but giving a new undertaking.

The Code provides that a warrant of attachment may be granted to accompany the summons, or at any time after the commencement of the action and before final judgment therein (*Sec. 638*). It is provided by section 416 that from the time of granting a provisional remedy the court acquires jurisdiction and has control of all subsequent proceedings, but that this jurisdiction is conditional and liable to be divested, where made by special provision dependent upon some act to be done after the granting of the provisional remedy.

If the second attachment is to be regarded as an entirely new proceeding in a new action, of course there can be no question as to its validity. But, treating it as a second attachment in the same action, it is claimed that by the failure to commence the publication within thirty days after the granting of the first attachment the action abated and the court lost jurisdiction and, consequently, the second attachment fell with it.

It is questionable whether the lapse of thirty days without publication of the summons ousts the jurisdiction of the court or abates the action, or merely avoids the attachment; for it is provided by section 441 that where an action is brought against a non-resident, and an order of publication is made, the first publication, or the service out of the state, must be made within three months after the order of publication is granted. But, however this may be, even the thirty days had not expired when the second attachment was granted, and the granting of this warrant, we think, gave the plaintiffs thirty days from that time to commence publication. We see no reason why a plaintiff, after having obtained one warrant of attachment and order of publication, may not abandon them and take out a new attachment and order, provided this course

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is not pursued for the mere purpose of vexation, in which case he would be liable for the damages unnecessarily occasioned. Several attachments may be issued in the same action to different counties (*sec. 646*), and if one should be defective or fail for any reason, there is nothing which prohibits an application for a new one.

After the granting of the second warrant a new order of publication was made on the sixteenth of June, and the plaintiffs had thirty days from the twelfth of June, the date of the second warrant, to commence publication under that order, which they did.

It is objected that the same affidavit was used on the application for the second attachment which had been used on the application for the first, and the cases of *McCoy agt. Hyde* (8 Cow., 68), *Cutter agt. Briggs* (2 Hill, 409) and *Robinson agt. Sinclair* (1 How. Pr., 106) are referred to as showing that the affidavit could not be used a second time. In *McCoy agt. Hyde* (8 Cow., 68) summary proceedings before a county judge had been instituted, under the statute, to oust a tenant, and after a verdict had been rendered for the tenant the same affidavit by which the proceeding had been instituted was used as the foundation of a new notice to the tenant to appear before the judge, and it was held that this could not be done, as it was the duty of the magistrate to preserve the affidavit as part of the record of the original proceeding which had been terminated. But no such reason exists in the present case. The new attachment was issued in the same action, and the affidavit would necessarily remain as part of the proceedings in that action. There is no positive rule that no affidavit can be twice used. In *Barnard agt. Heydrick* (49 Barb., 70), it was held that to obtain an order of publication against a non-resident, an affidavit might be used which had been made in a different action, all that the Code required being that the facts should appear by affidavit to the satisfaction of the judge; and in *Langston agt. Wetherill* (14 Mees & W., 104) it was held, after advisement and with the

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concurrence of the whole court, that on an application to a judge to hold a defendant to bail, the plaintiff might use affidavits made and used shortly before on a similar application against the same defendant by a different plaintiff; that the test as to its admissibility was, whether perjury could be assigned upon it, and that, as to the suggestion that the facts alleged though true at the time it was made might not be true when used on the application, the same objection might be raised against any affidavit used a month after it was sworn to.

The other cases cited relate to affidavits of merits, as to which a strict rule of practice prevailed, that to prevent an inquest at the circuit an affidavit must be made and filed for that special purpose, and that its absence would not be supplied by an affidavit of merits filed with a plea or on a motion to change the venue, and generally the rule as to affidavits of merits was that they could only be used once. But, if the same rule was in practice applied to other affidavits, it was mere matter of practice, a departure from which, by the court, would not deprive it of jurisdiction to grant a provisional remedy in an action, where the affidavit used stated the necessary facts, and perjury could be assigned upon it.

The objection that Rule 25 was not complied with by showing whether any former application had been made, if founded in fact, would be a mere irregularity, which, if not regarded in the court below, would not be regarded here. Moreover, it is not specified in the notice of motion, and for that reason was not available to the appellants. It appears, however, that the first warrant was before the judge when he granted the second.

The orders of the general and special term should be modified, so as to grant the motion to set aside the first attachment and deny the motion as to the second, without costs to either party on this appeal.

All concur, except **ANDREWS, J.**, absent.

Pember agt. Schaller.

MARINE COURT OF THE CITY OF NEW YORK.

MILO W. PEMBER agt. OTTO SCHALLER.

Order of arrest — Amendment of undertaking — Sufficiency of allegations on information and belief — Code of Civil Procedure, sections 729, 730.

The undertaking required by the Code of Civil Procedure is amendable. And where the undertaking, on which the order of arrest was granted, is in the form required by the old Code of procedure, the defect is cured by the execution and service of a new undertaking which conforms to the requirement of the Code of Civil Procedure, and a motion to vacate the order of arrest will be denied on proof of the execution and service of new undertaking by the same sureties before the motion is heard.

Held, also, that a complaint on information and belief, verified by the agent of plaintiff, is sufficient on a motion to vacate, where the agent sets forth in the verification, and also in a separate affidavit, the sources of his information and the grounds of his belief.

Special Term, April, 1880.

MOTION by defendant to vacate order of arrest on the grounds:

(1.) Insufficiency of the undertaking, it being under Code of Procedure as to form and not as required by Code Civil Procedure.

(2.) Insufficiency of complaint and affidavit, because verified on information and belief only.

The action was for deceit, in obtaining goods on credit, defendant falsely representing, as alleged, that he was solvent when he was insolvent. The complaint was verified by the agent of plaintiff on information and belief. The agent also made an affidavit independently of the verification; both were on information and belief solely.

James R. Cuming and Lewis J. Morrison, for the motion:

I. The affidavits are defective in that they are on information and belief solely.

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II. The undertaking is fatally defective, because a substantial requirement is omitted, to wit, to pay costs and damages in case plaintiff was not entitled to the order. The defect goes to the jurisdiction of the court and is not amendable.

Chauncey B. Ripley and *M. C. Gross*, opposed :

I. The affidavits are sufficient because they, with the complaint, allege all the essentials requisite in support of the charge, as follows: The intent to deceive; the false and fraudulent representations of defendant made to plaintiff; the reliance and belief of plaintiff inducing the delivery of the property; the falsity of the representations; the allegation that plaintiff would not otherwise have parted with his property; the non-payment of the debt and the damages (9 *Abb.*, 106). Where affidavits are on information and belief, and an excuse is shown for making them, and they are not denied, it is sufficient (*Union Bank agt. Mott*, 9 *Abb.*, 106, 109); and defendant will be presumed to concede their truth (*Id.*; *Brooklyn Daly Union agt. Hayward*, 11 *Abb.* [*N. S.*], 235, 243, 244).

II. The undertaking is defective in not conforming *verbatim* to the requirements of the amendment of 1879, by reason of a mistake in the use of an old blank form instead of a new one.

The defect is amendable (*Code of Civil Procedure*, sec. 729, 730); on a motion to discharge from arrest and in any respect (*per DAVIES, J., Bellinger agt. Gardner*, 2 *Abb.*, 441, 444), and where the motion to vacate is on that ground (*Kissam agt. Marshall*, 10 *Abb.*, 424).

The undertaking has been amended and service made which cures the defect, and is submitted herewith for approval.

III. The amendment should be with costs in the action if costs are allowed, because the error was one of the attorney.

GOEPP, J. — The defect in the undertaking is amendable. The sources of information respecting the untruth of the

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representations made are quite unsatisfactorily stated under that head in the verification. But the same person who makes that verification in his independent affidavit states that the source of his information on this head was Mr. Pool; though he ought to have gone on to explain the absence of Mr. Pool's own affidavit; yet, as there is no denial of the allegations, I think that, under *Union Bank agt. Mott* (9 *Abb.*, 106) and *Brooklyn Daily Union agt. Raymond* (11 *Ab. [N. S.]*, 235), the motion must be denied, without costs.

N. Y. COMMON PLEAS.

HARRIETTE M. BOYD agt. AUGUST BELMONT.

Assignment — what may be assigned — Covenant against incumbrances which is broken when deed is delivered is assignable — Parties — Complaint — Demurrer.

The rule that a covenant in a deed against incumbrances which is broken when the deed is delivered, does not pass like covenants that run with the land to a subsequent purchaser, as it is a chose in action which is not assignable, is no longer the law in this state.

Under the Code all choses in action are assignable, except those that, from their nature or because they are forbidden by law, cannot be assigned, such as the right to a revolutionary pension, the unearned salary of a public officer, the beneficial interest of a *cestui que trust* in certain cases, &c., and the action must be brought in the name of the assignee, he being the real party in interest.

The distinction between a covenant and a covenant broken is, therefore, no longer material in this state, the covenant, though broken, being assignable and suable in the name of the assignee.

The covenant against incumbrances (now that the objection that choses in action are not assignable no longer exists) necessarily passes to the person to whom the land is conveyed, together with the land, because, if there be an incumbrance, it affects the value of the land, and, to the extent of the incumbrance, impairs the title.

Accordingly, where the plaintiff, by the sheriff's deed, acquired all the rights in the property which the defendant had conveyed to B., and

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when the plaintiff, to save her estate from the effect of the incumbrance, was compelled to pay it off, the defendant having refused so to do, *held*, that she could maintain an action upon the covenant which had passed to her with the land by assignment, to recover the damages she had sustained by the breach of it.

Special Term, 1880.

DALY, C. J. — A covenant in a deed against incumbrances has all that is essential in a covenant running with the land, for what is required in a covenant to make it run with the land is that it shall affect the nature, quality or value of the property conveyed, and that there shall be in respect to it privity of estate (*Platt on Covenants*, 461; *Colby agt. Osgood*, 29 *Barb.*, 343 and cases cited). The reason, however, why it was held not to run with the land is the one given in *Lewis agt. Ridge* (*Cro. Eliz.*, 863), that such a covenant is broken when the deed is delivered, there being then an incumbrance; so that it is, on the delivery of deed, merely a chose in action, which, at the early period when *Lewis agt. Ridge* was decided, could not be transferred, and, therefore, could not pass with the land, as a chose in action was incapable of assignment by the common law so as to vest in the assignee any right to sue upon it; and it was upon this ground that it was held in this country that no action could be maintained by an assignee upon such a covenant, or the covenant of seizin, or of the right to convey, because if not true there was a breach of these covenants as soon as executed that made them choses in action which were not assignable (4 *Kent's Com.*, 471 [4th ed.]; *Greenby agt. Wilcocks*, 2 *Johns. R.*, 1; *Marshall agt. Hobbes*, 2 *Mass.*, 433; *Bartholomew agt. Candee*, 4 *Pick.*, 167).

This rule was founded upon purely technical grounds, and has not been regarded as a satisfactory one (*Colby agt. Osgood*, 29 *Barb.*, 341, 342, 343), for the reasons given in the very able dissenting opinion of judge BROCKHOLST LIVINGSTON, in *Greenby agt. Wilcocks* (*supra*), as the assignee in possession, if the incumbrance remained and was enforced or had to be

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removed by him, was the one who was damaged by the non-performance of the covenant, for the covenantee, having parted with the property, sustained no actual injury, and if he brought an action for the breach of the covenant, could recover nominal damages only, whilst the party really injured was practically without remedy.

In *Kingdom agt. Nottle* (1 *M. & S.*, 355) it was held that upon a covenant of seizin, which comes within the same rule, being broken, if untrue, as soon as it was made, that no action could be maintained by the executor for the breach of such a covenant; that the testator might have sued for the breach of it during his lifetime, but as he had not the covenant with the right to sue for the breach of it, devolved with the estate upon the devisee, which was equivalent to holding that the covenant ran with the land and passed to the devisee, notwithstanding that it had been broken in the lifetime of the testator; and the devisee having afterwards brought his action upon the same covenant, recovered for the breach of it (*Kingdom agt. Nottle*, 4 *M. & S.*, 53), the court holding that such a covenant ran with the land, and, though broken during the lifetime of the covenantee, that it was a continuing breach in the time of the devisee, so as to entitle him to bring an action for the injury he had sustained by the breach of it.

In *Backay agt. McCoy* (3 *Ohio*, 211), after a full examination of the cases in this state, in Massachusetts, and in England, it was held that if the grantor, at the time of the conveyance was in possession under color of title, claiming a fee, that the covenant of seizin is a real covenant that is annexed to the land and passes with it to the heir or assignee, until he who has the paramount title asserts it by the eviction of the person in possession, who then has a claim for damages under the covenant, which he may enforce by action, and being then a thing in action, it is not, after that, assignable by the common law. In *Foots agt. Burnett* (10 *Ohio*, 317), after a very thorough review of all the authorities, and of the preceding case in the same court, it was held that a covenant against

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incumbrances, like the covenant of seizin, is made for the benefit of the grantee, in respect to the land ; that it is not to be understood as a contract in which the immediate parties are alone interested, but is intended for the security of all subsequent grantees ; that, if the first grantee continues in possession of the land, while his title remains undisturbed, and conveys to a subsequent grantee, in whose time an outstanding incumbrance is enforced against the land, justice requires that this subsequent grantee should have the benefit of the covenant against incumbrances to indemnify himself ; and professor Washburn, after reviewing the authorities, says : " It would seem that the covenant against incumbrances may run with the land, and may be sued by whoever is the owner of the land, if the same be not in fact broken until the owner shall have acquired title to the premises ; provided the incumbrance be of such a nature that when it takes effect to impair the value of the premises, it relates back to the time of making the deed and covenant ; " the reason given for which, is, that if the subsequent owner cannot sue upon this covenant, he is wholly without remedy (3 *Washburn on Real Property*, 396, 3d ed.). The decision in *Kingdom agt. Nottle and Foote agt. Burnett* (*supra*), as well as what was said by professor Washburn, apply to the present case. The incumbrance here existed when the covenant was made and the premises conveyed to Bird. It was an assessment and, remaining unpaid, the premises were sold by the city, whilst Bird was the owner, for the amount of the assessment, and a certificate was given to the purchaser, which entitled him to a lease of the premises for a certain number of years after the expiration of a fixed period, if they were not redeemed within that period by the payment of the assessment, interest, &c. The plaintiff, after she became the purchaser, upon the foreclosure of her mortgage, and had received the sheriff's deed, requested the defendant, in consequence of his covenant, to discharge the incumbrance, which he refused to do ; whereupon she, to prevent the giving of a lease to the purchaser at the tax sale, paid off

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the incumbrance, which was a continuing breach of the covenant that took effect to her damage and injury, when she was compelled to pay off the incumbrance in consequence of the defendant's refusal to do so, and without which the property would have passed to the purchaser at the tax sale for a term of years.

But it is not necessary, in overruling the demurrer, to rest on that ground alone. The rule that a covenant against incumbrances, which is broken when the deed is delivered, does not pass, like covenants that run with the land, to a subsequent purchaser, as it is then a chose in action, which is not assignable, is no longer the law in this state, because the reason upon which it was founded — or, to express it differently, the difficulty which led to the adoption of a rule so technical and so unjust in its practical operation — no longer exists in this state. Though choses in action were not assignable at the common law they were assignable in equity. Courts of equity would always protect the beneficial interest of the assignee, and, ultimately, courts of law recognized the right of the assignee of a chose in action to sue upon it in the name of the assignee; so that even in courts of law it became little more than a technical rule of pleading in respect to parties, which the Code finally abolished by providing that every action shall be prosecuted in the name of the real party in interest; and the one hundred and twelfth section (*Code of 1870*) makes express provision for actions by an assignee of a thing in action. This, together with the general provision that the distinction between suits at law and suits in equity and the form of all such actions are abolished, and that there is to be but one form of action, has swept away the whole ground upon which this rule rested. All choses in action are assignable, except those that from their nature, or because they are forbidden by law, cannot be assigned, such as the right to a revolutionary pension, the unearned salary of a public officer, the beneficial interest of a *cestui que trust* in certain cases, &c.; and the action must be brought in the name of the

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assignee, he being the real party in interest. The distinction between a covenant and a covenant broken is, therefore, no longer material in this state, the covenant, though broken, being assignable and suable in the name of the assignee. The covenant against incumbrances — now that the objection that chases in action are not assignable no longer exist, necessarily passes to the person to whom the land is conveyed, together with the land, because, if there be an incumbrance, it affects the value of the land, and, to the extent of the incumbrance, impairs the title. The plaintiff, by the sheriff's deed, acquired all the rights in the property which the defendant had conveyed to Boyd; and when the plaintiff, to save her estate from the effect of the incumbrance, was compelled to pay it off, the defendant having refused to do so, she could maintain an action upon the covenant, which had passed to her with the land, by assignment, to recover the damages she had sustained by the breach of it (*Hunt agt. Amidon*, 4 *Hill*, 345; *Thompson agt. Rose*, 8 *Cow.*, 266; *Beddes' Exrs. agt. Wadsworth*, 21 *Wend.*, 120; *Norman agt. Wells*, 17 *id.*, 150; *Ezall agt. Partridge*, 8 *T. R.*, 308). The demurrer is, therefore, overruled with liberty to the defendant to answer in ten days, on payment of costs of demurrer, or otherwise judgment for the plaintiff on the demurrer.

D I G E S T

CONTAINING THE WHOLE OF

58 HOW., ANTE, AND QUESTIONS OF PRACTICE CONTAINED
IN 18 AND 19 HUN, AND 75 AND 76 N. Y. REPORTS.

Attention is called to the two additional headings "CODE OF PROCEDURE" and "CODE OF CIVIL PROCEDURE," under which (for the convenience of the reader) will be found collated decisions bearing upon the various provisions of both Codes.

ACCOUNTING.

See WILL.

Giraud agt. *Giraud*, ante, 175.

ACKNOWLEDGMENT.

1. The officer, before whom a corporate deed is acknowledged, is not required to take evidence that the corporate seal was affixed by due authority, or as to the title of the officer who executed it. (*Canandaigua Academy* agt. *McKeehie*, 19 Hun, 62.)
2. A certificate of proof or acknowledgment in due form proves itself, and no proof of its genuineness is required. (*Id.*)
3. A certificate of proof or acknowledgment need not be in the precise language of the statute; it is enough if it show a substantial compliance therewith. (*Id.*)
4. A mortgage under seal is a deed, so that a commissioner authorized to take acknowledgment of deeds may take proof of its execution. (*Id.*)

ACQUIESCENCE.

See WILL.

Giraud agt. *Giraud*, ante, 175.

ACTION PENDING.

1. In September, 1876, the plaintiff attempted to commence an action against the defendants herein, but by mistake omitted to state the proper name of one of the defendants in the summons and complaint served. Subsequently, on motion of the attorney for the other defendant, an order was made setting aside the complaint, with ten dollars costs, directing the summons to be amended by adding the name of the defendant improperly named and allowing the plaintiff to serve an amended complaint and a copy of the amended summons within ten days, upon payment of ten dollars costs. The plaintiff did not pay the ten dollars costs, or serve the amended summons and complaint, though more than ten days elapsed since he was served with notice of the entry of the order.

This action was brought against the same defendants for the same cause of action stated in the former complaint:

Held, that the former action was not pending at the time of the commencement of the second action so as to prevent the prosecution of the latter. (*Owens* agt. *Loomis*, 19 Hun, 606.)

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ADDRESS.

1. The court may, in a proper case, make an order requiring the attorney for the plaintiff to furnish the defendant with the plaintiff's residence and address. (*Corbett agt. Gibson*, 18 *Hun*, 49.)

ADVERSE POSSESSION.

1. Declarations of a party as to the title claimed by him are admissible as evidence if made while he was in possession of the premises in dispute, and it is not necessary that they should have been made while he was actually upon the land. (*Sweettenham agt. Leary*, 18 *Hun*, 284.)
2. One who has entered into possession of and occupied certain premises under a deed, and who has inclosed the same with a substantial fence, is entitled to claim a title, by adverse possession, to the whole of the premises so inclosed, though a portion thereof is not included in the land described in the deed. (*Id.*)
3. To establish the practical location of a boundary line, it is not requisite to prove an actual agreement, but acquiescence in its location, even if erroneous, with occupation in accordance with it, for a sufficient length of time to bar an entry, will suffice. (*Id.*)

AFFIDAVITS.

1. The acknowledgment of an undertaking, executed in pursuance of the provisions of the Code of Civil Procedure, and the justification of the sureties therein, written thereon, are essential parts of the instrument (*Code of Civil Procedure*, secs. 810, 812). (*Bliss agt. Molter et al.*, ante, 112.)
2. The affidavits of justification of sureties, on an undertaking given

to discharge an attachment, are affidavits made in the action and, if made before the attorney for the defendant, the undertaking will not be approved or the discharge granted. (*Id.*)

See ATTACHMENT.

Mojarietta and another agt. Saens and another, ante, 505.

8. An application for an attachment, is fatally defective which does not state that a certain sum is due "over and above all counter-claim," as required by section 636, subdivision 1 of the Code of Civil Procedure. (*See Lyon agt. Blakesly*, 19 *Hun*, 299.)

AFFIRMANCE.

See PRACTICE.

Board of Supervisors agt. Bristol, ante, 8.

AGREEMENT.

1. The rule that when an agreement between parties is reduced to writing, it cannot be controverted or varied by parol evidence, applies only to parties to the agreement. But when persons not parties to the agreement, and in no way connected therewith, are interested like judgment creditors, for example, to show what the agreement was, they may resort to parol evidence to show what the real transaction in fact was, notwithstanding the writing. (*Brown agt. Thurber et al.*, ante, 95.)

ALIEN.

1. An action pending in a state court against an alien defendant cannot be removed into the United States circuit court for trial, under the acts of congress, upon the ground of such alienage, if the plaintiff

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be also an alien. (*Barrouclisse* agt. *La Caisse Generale*, ante, 181.)

2. For the purpose of federal cognizance a corporation created under the laws of the republic of France is an alien. (*Id.*)

ALIMONY.

1. Where an action for divorce is commenced by the service upon the defendant of a summons alone, and he neglects to appear therein, the judgment may award final alimony, if demanded in the complaint, without any notice being given to him of the application to be made therefor. (*Park* agt. *Park*, 18 *Hun*, 486.)
2. The right of the wife to final alimony, and the ability of the husband to furnish it, are to be determined by the situation and condition of the parties at the time of the entry of final judgment, and is not to be modified by any subsequent change in the situation of either party. (*Id.*)

AMENDMENT.

1. Plaintiff served her complaint, and just before time for answering expired the defendant served a notice of motion to strike out certain irrelevant allegations of the complaint and to compel plaintiff to separately state and number the counts of the complaint. Before time to answer had expired, plaintiff served an amended complaint, complying with the requirements of defendant's motion, which defendant refused to receive unless costs of motion were paid, which plaintiff declined to pay:
Held, that, under section 543 of the Code of Procedure, plaintiff should not be required to pay costs of motion. (*Welch* agt. *Freston et al.*, ante, 52.)

2. The words "without prejudice to the proceedings already had" were not designed to compel a party who had committed an error in his pleadings to pay costs of one amendment, and thereby nullify the right which had been secured to him by the statute, of "once amending his pleading, of course, without costs." (*Id.*)

See ORDERS.

Mojarietta et al. agt. *Saenz et al.*, ante, 494.

3. Under the provision of the Code of Procedure (*old Code*, sec. 272) giving to a referee the same power as the court to allow amendments to pleadings on trial, a referee had power on application to amend the complaint on trial (not simply so as to conform it to the proof, but by inserting material allegations as to which no proof had been given) to impose as a condition to the granting of the application, that defendant be permitted to answer or demur to the amended complaint. (*Smith* agt. *Rathbun*, 75 *N. Y.*, 122.)
4. Where such a condition was imposed, and plaintiff availed himself of that portion of the order of the referee which allowed him to amend, and defendant interposed a demurrer to the amended complaint, *held*, that plaintiff having taken the benefit of the order was precluded from questioning the power of the referee to authorize the demurrer. (*Id.*)
5. Where action was brought against the members of a board of education of a union free school district jointly, as trustees, for negligence, *held*, that complaint could not be amended by striking out name of the defendants and inserting that of corporation; nor could it be amended by striking out all the defendant's names, save one, and his designation as trustee; also, that a motion for amendment

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should be made at special term. (*See Bassett* agt. *Fish*, 75 N. Y., 804.)

6. This court has no power to amend a record of the supreme court; any amendment must be sought in that court. (*Kenyon* agt. *N. Y. C. and H. R. R. R. Co.*, 76 N. Y., 607.)

ANSWER.

1. In an action brought by the wife against the husband for adultery where the defendant appeared and denied the adultery, and on the plaintiff's motion the defendant was ordered to pay a certain sum towards the expenses of the action, and upon demand being made the defendant neglected and refused *in toto* to comply with the order, upon proof of these facts the plaintiff moves for an order "striking out the defendant's answer and for an order of reference as in case of default:"

Held, that the motion should be denied. The only power possessed by the court to strike out a pleading, or to change and alter the same in any particular on a motion like this, is contained in sections 538, 545 and 546 of the Code of Civil Procedure; and this is not a case within either of those sections. (*McCrea* agt. *McCrea*, ante, 220.)

2. So long as there is an issue framed by the pleadings, in an action for a divorce, there can be no reference. (*Id.*)
8. In an action for a dissolution of a copartnership, it is almost a matter of course to grant an injunction and appoint a receiver. (*McEnroe* agt. *Decker*, ante, 250.)
4. Under section 630 of the Code of Civil Procedure, upon a hearing of a contested application for an injunction order, or to vacate or modify such an order, a verified answer has the effect only of an affidavit. (*Id.*)

5. Under this section the court has the power to determine the weight to be given to the denial contained in the answer, in the same manner and to the same extent as it has to determine other questions arising upon conflicting affidavits. (*Id.*)

6. Where the answer alleged that "the defendant denies each and every allegation in the complaint contained, and not hereinafter specifically admitted or denied, or not hereinafter specifically admitted or avoided:"

Held, that a denial in this form is neither a general or specific denial, and is a form of denial in no way provided for by the present system of pleading. (*Id.*)

7. A denial in an answer, "upon information and belief," is not authorized by the Code, and is insufficient. (*Swinburne* agt. *Stockwell*, ante, 312.)
8. Where there is no sufficient denial for the purposes of the action, the complaint is admitted. Facts set forth as a defense in an answer, inconsistent with the complaint, cannot be construed as a denial, so as to prevent the allegations of the complaint from being taken as true. (*Id.*)
9. A pleading will be held frivolous where there is a decision in point adverse to its sufficiency. (*Id.*)
10. That the answers were interposed in good faith, if frivolous, will not furnish any defense to a motion for judgment on such answers, but is good reason for allowing an amendment. (*Id.*)
11. An allegation in an answer "that the contract set forth in said complaint is inoperative and void for want of a sufficient and adequate consideration therefor," is an allegation of a conclusion of law. It is necessary to aver the facts which would show that there was no

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sufficient and adequate consideration. (*Hammond* agt. *Earle and another*, *ante*, 426.)

12. Each answer must, of itself, be a complete answer to the whole complaint, as perfectly so as if it stood alone. Unless, in terms, it adopts or refers to the matter contained in some other answer, it must be tested as a pleading alone by the matter itself contains. If it is not complete, in and of itself, it is insufficient in law and cannot be sustained by reference to the other defenses contained in the answer. (*Id.*)
13. A defense that the plaintiff is not the real party in interest, is not available unless supported by facts pleaded like any other defense. (*Id.*)
14. The defense of recoupment is available, if facts support it, whether pleaded for that purpose or otherwise. If the allegations in respect to that defense are not sufficiently definite and certain to enable the plaintiff to understand them, or to raise a clear and precise issue, the remedy by the plaintiff is by motion to make more definite and certain. (*Id.*)
15. Where the facts alleged in the answer are sufficient to entitle the defendant to a recoupment of his damages, even if they are obscurely or vaguely set forth, the answer is not, for that reason, demurrable. (*Id.*)
2. The service of a copy of a referee's report and notice of filing on the plaintiff's attorney does not operate to limit the plaintiff's time to serve a case or exceptions. The time does not begin to run until the entry of judgment and notice thereof, and the plaintiff has ten days thereafter within which to serve a case and exceptions. (*Id.*)
3. The reversal, upon appeal by the common pleas general term, of a judgment rendered against a defendant by a district court of the city of New York for an amount of damages exceeding fifty dollars, entitles such defendant to ten dollars extra costs as part of the costs of the district court. (*Boyd* agt. *Disbrow*, *ante*, 399.)
4. *Ellert* agt. *Kelly* (4 E. D. Smith, 12) explained. (*Id.*)
5. In an action brought by The People on relation of B. and by said B., who unites therein against the defendant K., to determine the right of said K. to the office of inspector of weights and measures in the city of New York, the referee to whom the issues were referred found, among other conclusions, that neither B., the relator, nor K., the defendant, was lawfully entitled to said office; that the plaintiff, The People, were entitled to judgment against the right of the relator B. to hold said office and that he be ousted and removed therefrom, and he directed judgment to be entered accordingly; that the plaintiff, The People, were also entitled to judgment against the defendant K.; that he be ousted and removed from the office and for costs in this action, and he directed judgment to be entered accordingly. The relator excepted to the conclusions of law that neither he nor K. was lawfully entitled to the office, and to the conclusion that The People were entitled to judgment against him. (*The People ex rel. Banta* agt. *Kent*, *ante*, 407.)

APPEAL.

1. Under the Code of Civil Procedure, as well as under the old Code, the party desiring to appeal has, at least, an equal time to serve the case which he has to frame the exceptions which it is to contain, and any court rule abridging this time is inconsistent with the Code and inoperative. (*French* agt. *Powers*, *ante*, 389.)

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6. The only judgment shown by the papers to have been entered is briefly as follows: That said K. was not duly and legally appointed to the office, and that he has intruded himself into said office and is exercising the duties thereof without lawful authority, and it is ordered and decreed that the report of said referee be, in all things, confirmed, and that the said K. be ousted and excluded from said office and that the plaintiffs recover of said defendant their costs. From this judgment B. appealed:

Held, that there is nothing in the judgment as it appears in the papers upon which B. can sustain his appeal. The judgment, as entered, instead of being one against him is in his favor, so far at least as a recovery of costs is concerned. (*Id.*)

See PRACTICE.

Board of Supervisors agt. Bristol, ante, 3.

7. Where an executor appeals from a decree of the surrogate, entered upon the final settlement of his accounts, and the petition of appeal contains a specification of but one item, the respondent may set forth such other items of the account as he may claim to be erroneous, as against him and in favor of the appellant, though the error be one which is prejudicial to the respondent, only in common with all the other beneficiaries, none of whom have appealed or applied to be made respondents. (*Cox agt. Schermerhorn, 18 Hun, 16.*)
8. On an appeal taken under subdivision 2 of section 349 of the Code, from an order overruling a demurrer, the successful party is entitled to tax as costs, under subdivision 5 of section 307 of the Code, twenty dollars before and forty dollars for argument. (*Wright agt. Flemming, 18 Hun, 360.*)
9. The issues in an equity action were framed and submitted to a jury; a verdict was rendered thereon; the whole case was afterwards heard before the same judge before whom the jury trial was had; he made his decision on which judgment was entered; a case was served on appeal containing the testimony and the plaintiff's exceptions to evidence taken on the jury trial, for which the judge on the settlement of the case substituted the specific questions of facts submitted to the jury and their answers thereto. The appellant then moved for a new trial of the issues of fact:
- Held*, that the party appealing had a right to include in the case the evidence given on the jury trial as well as any subsequently given before the judge alone. (*Chapin agt. Thompson, 18 Hun, 446.*)
10. To render an appeal to the county court from a judgment of a justices' court effectual, the respondent's costs included therein must be paid and the justice's fees must be paid or relinquished by him within twenty days from the rendition of the judgment, and if they are not so paid the appeal will be dismissed. (*Thomas agt. Thomas, 18 Hun, 481.*)
11. An order of a county judge, adjudging a party guilty of contempt in violating an injunction contained in an order directing him to appear for examination in supplementary proceedings, involves a substantial right and is appealable under section 1342 of the Code of Civil Procedure. (*Newell agt. Outler, 19 Hun, 74.*)
12. A failure to show the party the original order, when serving him with a copy, is a mere irregularity, which is waived by his appearing, without objection, before the referee and submitting to an examination. (*Id.*)

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13. An order of a county court dismissing an appeal from a justices' court, on the ground that the notice of appeal was defective, is appealable to the general term, under section 1342 of the Code of Civil Procedure. (*Andrews* agt. *Long*, 19 *Hun*, 808.)
14. A notice of appeal by a plaintiff from a judgment of a justices' court, in favor of the defendant, stating that the judgment was rendered upon an issue of fact; that the claim in litigation was for more than fifty dollars, and that the judgment was rendered contrary to the evidence on the trial, sufficiently states the grounds of appeal. (*Id.*)
15. Where a notice of appeal from the judgment of a justices' court was signed "John Andrews, plaintiff's attorney," and there was nothing in the case showing his authority to appear for the appellant, *held*, that it was insufficient. (*Id.*)
16. The rule that where there is conflicting evidence, or any evidence to sustain a finding, it is error to reverse, has no application where the appellate court has power to review the facts. (*Moran* agt. *McLarty*, 75 *N. Y.*, 25.)
17. In such case while proper allowance should be made for the judgment of the trial court, it is not controlling, and the appellate court must assume the responsibility of determining the facts from the evidence. (*Id.*)
18. *It seems*, that under the provision of the Code of Civil Procedure (*new Code*, sec. 194, sub. 3), in regard to appeals to this court, in determining whether plaintiff's demand amounts to \$500, so as to authorize an appeal by him, the amount of that demand at the time of the commencement of the action must govern; interest subsequently accruing cannot be considered, although the case is one where allowance of interest to the time of the trial is the ordinary incident of a recovery. (*Josue* agt. *Conner*, 75 *N. Y.*, 156.)
19. Plaintiff commenced her action February 17, 1877, against defendant, a sheriff, for an alleged false return, she asked judgment for \$414.30, with interest from January 15, 1875. Judgment dismissing the complaint was entered October 25, 1877, and appeal to the general term taken December 3, 1877; adding interest on the amount claimed up to this time it would not amount to \$500:
Held, that in the absence of an order of the general term allowing an appeal, its judgment affirming the judgment below was not appealable. (*Id.*)
20. An order denying a motion to set aside a judgment for deficiency in a foreclosure suit, where the motion is based upon the fact that by a clerical error the name of the defendant against whom such judgment is rendered was omitted from the prayer for judgment for deficiency in the copy of the complaint attached to the judgment roll, is not reviewable here; it involves simply questions of practice. (*Tucker* agt. *Leland*, 75 *N. Y.*, 186.)
21. So, also, an order denying a motion to set aside judgment of foreclosure and sale because of non-joinder of a party defendant, is not reviewable here. (*Id.*)
22. Judgment of affirmance on decision of general term was perfected herein August 3, 1877, a copy thereof with notice of entry was served August seven. On application for retaxation of costs an order was granted August thirty striking out one item of one dollar and twenty-five cents; it did not appear that the judgment was ever actually modified. An undertaking on appeal was filed

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- and served August 30, 1878, both the undertaking and notice described the judgment as entered. On motion to dismiss appeal, *held*, that as it was not perfected within one year from August 3, 1877, it was too late. (*Wilson* agt. *Palmer*, 75 N. Y., 250.)
23. A judgment for plaintiff will not be reversed on appeal because of an omission to aver in the complaint or to prove upon the trial a fact essential to the plaintiff's case, unless the defect was pointed out and is reached by a proper exception taken on the trial. (*Thayer* agt. *Marsh*, 75 N. Y., 340.)
24. In an action by the assignee of a mortgage against a grantee of the mortgaged premises upon a covenant in his deed to pay the mortgage, the complaint alleged the execution of the mortgage by P., defendant's grantor, that it was given to secure a part of the purchase-price of the mortgaged premises, and that at the time it was executed P. was the owner in fee. These facts were admitted in the answer:
Held, that in the absence of a demurrer, or of a motion on the part of defendant to make the complaint more definite and certain, or of any specification of any defect on the trial, the complaint might be construed, for the purpose of upholding the judgment, as inferentially averring that the mortgage was given for a debt owing by P., and for which he was personally liable. (*Id.*)
25. At the close of the evidence defendant's counsel moved for judgment without specifying any grounds, or suggesting any point wherein plaintiff's case was defective. The motion was denied and exception taken:
Held, that the exception was insufficient, that the defect should have been specified. (*Id.*)
26. This court cannot upon appeal from an order adjudging a receiver in contempt in refusing to obey an order requiring him to make payments out of funds in his hands, review the order directing the payment; the supreme court has power to direct its receiver as to the disposition of funds in his hands, and its order to that effect, if not appealed from, must be obeyed whether correct or not; the propriety of the exercise of the power cannot be considered on such an appeal. (*Clark* agt. *Bnninger*, 75 N. Y., 344.)
27. Where an order granting an application under the Code (*new Code*, secs. 682, 683) by a lienor to vacate or modify an attachment, recites the reading of certain affidavits specified, including new affidavits on the part of plaintiff, without noticing any objections thereto, the only question for the general term upon appeal is whether, upon all the papers before the special term, its order was justified; and, upon appeal to this court, the lienor cannot raise the question, that plaintiff should have been confined to his original affidavits, and that affidavits supplying defects were improperly admitted on the hearing of the motion. (*Godfrey* agt. *Godfrey*, 75 N. Y., 484.)
28. Where an appeal to this court from an order of general term involves an inquiry into the power of that court over its own records, to correct them so that they may express the purpose and judgment of the court, it is proper to look into the opinion of the general term, as delivered upon the rendition of judgment, to learn what was its purpose. (*Salmon* agt. *Godney*, 75 N. Y., 479.)
29. In an action to foreclose a mortgage, A. and G. were made parties defendant; their interests were the same, G. claiming as grantee of A. They put in separate answers; the litigation was upon the

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answer of A. Plaintiff obtained judgment; A. appealed, G. did not. The minutes of the decision of the general term were as follows: "Judgment reversed, new trial granted, costs to appellant to abide the event." An order was thereupon entered reversing the judgment as to A. only, and directing a new trial as to her. It appeared by the opinion of the general term to have been its intention to reopen the whole case and to send it back for a new trial as to all the parties interested. Plaintiff, without notice to G., discontinued as to A. On motion of G. the general term modified its order so as to reverse the judgment *in toto* and to grant a new trial both as to G. and A.:

Held, that the general term had power to so modify; and that upon appeal to this court from the order directing the modification the question as to the power of the general term to reverse a judgment against a party who had not appealed was not presented, as its judgment was not up for review; that the question could only be presented by appeal from the order of reversal. (*Id.*)

80. The fact that the object of an action may be defeated by refusing a temporary injunction is not of itself sufficient to deprive the court of all discretionary power in the matter. (*Young* agt. *Campbell*, 75 N. Y., 525.)

81. In an action by a tax-payer to restrain the collection of a tax for the payment of certain bonds, issued by some of the defendants as commissioners of a town to pay for railroad stock, a preliminary order of injunction was vacated on the grounds that plaintiff himself had taken part in the issue of the bonds, that it did not appear that the town desired to contest them, and that the bondholders had no opportunity to be heard:

Held, that even if there was any supposable case where this court

would review the discretion of the court below in refusing or vacating a temporary order of injunction, this was not one. (*Id.*)

82. *It seems*, that this court does not sit as an arbiter of manners as to the lower courts; and even if there is any thing overbearing or indecorous in the manner of the court, in putting a proper question to the prisoner when a witness on his own behalf on a criminal trial, it cannot be reviewed here unless injustice might have resulted. (*Arnold* agt. *People*, 75 N. Y., 803.)

83. A general exception to all of a charge, upon a particular point, is unavailable here when a portion of the charge is correct; the attention of the court must be called to the erroneous portions. (*Id.*)

84. Where the sureties to an undertaking upon appeal to this court from a final judgment fail to justify, the appellant may give a new undertaking at any time within the year allowed for appeal, and when given the appeal becomes effectual; and if the respondent fails to except to the sureties within the time allowed, the new undertaking becomes perfect for the purposes of the appeal (*New Code*, secs. 1825, 1826, 1837). (*Blake* agt. *L. and F. Mfg. Co.*, 75 N. Y., 611.)

85. An order refusing to punish an alleged contempt in disobeying an injunction is not appealable to this court. (*Simmonds* agt. *Simmons*, 75 N. Y., 612.)

86. Under the Code of Civil Procedure (*new Code*, sec. 1800), a notice of appeal to this court may be served before any undertaking has been executed, and the undertaking may be given at any time before the expiration of the time for appealing (sec. 1834); but the notice does not become effectual for any purpose until the undertaking has been given (*Sec.* 1826).

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(*Raymond* agt. *Richmond*, 76 N. Y., 106.)

37. A regular notice of appeal had been served herein, and an undertaking given which was not in compliance with the statute, and so was a nullity, a return was made and the cause put upon the calendar. The appellant moved to strike the cause from the calendar; the respondent moved to dismiss the appeal.

Held, that the case must be treated as if only a notice of appeal had been served; that, as this was regular, it could not be set aside, and as there was no undertaking there was no appeal to dismiss, no return could properly be made, and the cause was not properly upon the calendar; appellant's motion, therefore, granted and respondent's denied. (*Id.*)

38. An order directing judgment upon a pleading, as frivolous, is not appealable to this court. A frivolous pleading is not stricken out, but remains upon the record and becomes part of the judgment roll; and an order directing judgment thereon is only reviewable here upon appeal from the judgment. (*Com. Bk. agt. Spencer*, 76 N. Y., 155.)

39. Where a judgment creditor seeks by motion to set aside a prior judgment on the ground of fraud, it is within the discretion of the supreme court whether to determine the matter on motion or to require the creditor to bring an action; and from its determination no appeal lies to this court. (*Beards* agt. *Wheeler*, 76 N. Y., 213.)

40. A party is not prevented from urging, in an appellate court, a point distinctly made and presented on the trial, because it was not made in an intermediate appellate court. (*Cohn* agt. *Goldman*, 76 N. Y., 284.)

41. On appeal from an order adjudging the appellant guilty of contempt in not obeying a peremptory writ of *mandamus*, the question as to the propriety of the order granting the writ is not presented and cannot be considered. (*Peo. ex rel. Garbutt* agt. *R. and S. L. R. R. Co.*, 76 N. Y., 294.)

42. A notice of the entry of judgment, which is not indorsed or subscribed both with the name of the attorney and his office address or place of business, as required by the general rules of practice (*Rule 2*), is irregular and ineffectual to limit the time for appealing. (*Kelly* agt. *Sheehan*, 76 N. Y., 325.)

43. A party undertaking to limit the time for appealing is held to strict practice. (*Id.*)

44. The granting of the writ is, in general, discretionary; and where it is so the exercise of the discretion by the supreme court is not reviewable here. (*Peo. ex rel. Faile* agt. *Ferris*, 76 N. Y., 326.)

45. A decision of the court sustaining or overruling a demurrer, is an order not an interlocutory judgment; and, as in the provision of the Code of Civil Procedure (*new Code*, sec. 1349) specifying appealable orders, this is not enumerated, an appeal to the general term from such a decision does not lie. It can only be reviewed on appeal from a final judgment entered thereon. (*Cam. Val. Nat. Bk. agt. Lynch*, 76 N. Y., 514.)

46. The question whether a resale shall be ordered in a foreclosure suit is discretionary with the court below; and an order directing a resale is not reviewable here upon the merits. (*Goodell* agt. *Harrington*, 76 N. Y., 547.)

47. The court of common pleas of the city and county of New York has no jurisdiction to entertain an

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- appeal from an order of the marine court, except it be an order granting a new trial (*Old Code, secs. 84, 353, 354; sec. 9, chap. 545, Laws of 1874; sec. 43, chap. 479, Laws of 1875*). (*Bumberg agt. Stern, 76 N. Y., 555.*)
48. The word "judgment," as used in the provision of the Code of Procedure (*sec. 34*), conferring appellate jurisdiction upon the court of common pleas, was used in its usual sense and does not include determinations not resulting in judgments. (*Id.*)
49. Accordingly, *held*, that an order of the general term of the marine court granting a perpetual stay of proceedings, was not appealable to the common pleas. (*Id.*)
50. Where there has been a series of orders connected with the same matter, so that if one is erroneous all are, upon appeal from one the general term is authorized to reverse the whole so as to leave the records of the court clear and consistent. (*Stanton agt. King, 76 N. Y., 585.*)
51. The provision of the new Code (*sec. 1317*) in reference to, and so far as it effects, this point, does not differ from the old (*Sec. 330*). (*Id.*)
52. The general term, however, in such case can only grant costs of one motion, and on appeal from one order. (*Id.*)
53. This court has no jurisdiction to reverse a judgment in an action for negligence because of excessiveness of damages. (*Gale agt. N. Y. C. and H. R. R. R. Co., 76 N. Y., 594.*)
54. An order denying a motion to set aside a verdict and for a new trial, because of the alleged misconduct of a jury, is not reviewable here. The provisions of the new Code as to the jurisdiction of this court in such a case are not materially different from the old. (*Id.*)
55. This court has no power to amend a record of the supreme court; any amendment must be sought in that court. (*Kenyon agt. N. Y. C. and H. R. R. R. Co., 76 N. Y., 607.*)
56. Where, in an order of general term reversing a judgment entered upon a decision of the court on trial without a jury, it is not stated that the reversal was upon questions of fact, the reversal to be sustained in this court must be justified by some error of law, the opinion cannot be looked to to ascertain the ground of the reversal; if upon the facts it must appear in the body of the order (*New Code, sec. 1388*). (*Van Tassel agt. Wood, 76 N. Y., 614.*)

APPEARANCE.

1. The act of an attorney in subscribing himself as attorney for defendant to notice of motion, while probably sufficient to constitute an appearance for the purpose of waiving mere irregularities, is insufficient to entitle the attorney to notice of other and entirely different proceedings in the action. (*Douglas agt. Habersbro, ante, 276.*)
2. To require the service of notice of such proceedings, where no demurrer or answer has been served, a formal notice of appearance has been rendered necessary by the provisions of the Code of Civil Procedure, sections 421, 422. (*Id.*)

APPORTIONMENT.

1. Where property is conveyed subject to a mortgage upon which back interest has accrued, but has not become payable according to the terms of the instrument, and the vendee is obliged to pay such

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interest to the holder of the mortgage when it becomes due:

Held, that the vendee has no cause of action against the vendor for the proportionate amount which had accrued prior to the delivery of the deed, in the absence of an express covenant upon the part of the vendor to pay the same. (*Lynch* agt. *Rinaldo*, ante, 133.)

2. Rent, when apportioned as between assignor and assignee, see note at foot of case. (*Id.*)

ARREST.

1. A defendant arrested and subsequently surrendered by his bail, is entitled to be discharged upon tendering a new bond similar in form to the one first given. The sheriff cannot compel him to give a limit bond before execution, except it be a case wherein bail to pay the debt is required. (*McCallum et al.* agt. *Barnard*, ante, 169.)
2. In an action brought to recover a debt owing the plaintiff by an association, upon the statute making the trustees of the association who fail to file a report liable for the debts of the association :
Held, that, the liability to pay such debt is not a fine or penalty in the sense in which those terms are used in subdivision 1, section 549 of the Code of Civil Procedure, so as to subject the party to arrest. (*Glen's Falls Paper Company* agt. *White*, ante, 172.)
3. To subject a party to arrest the cause of action must be a fine or penalty, and not something of a penal character. (*Id.*)
4. The undertaking required by the Code of Civil Procedure is amendable. And where the undertaking, on which the order of arrest was granted, is in the form required by the old Code of Procedure, the defect is cured by the execution and service of a new undertaking which conforms to the requirement of the Code of Civil Procedure, and a motion to vacate the order of arrest will be denied on proof of the execution and service of new undertaking by the same sureties before the motion is heard:
Held, also, that a complaint on information and belief, verified by the agent of plaintiff, is sufficient on a motion to vacate, where the agent sets forth in the verification, and also in a separate affidavit, the sources of his information and the grounds of his belief. (*Pember* agt. *Schaller*, ante, 511.)
5. Code of Civil Procedure, section 550, subdivision 4—What facts do not authorize an arrest under—when motion to vacate an order of arrest may be made. (*See Genesee River National Bank* agt. *Mead*, 18 *Hun*, 803.)
6. Code of Civil Procedure, section 111—Includes a case where judgment is recovered by the defendant—on failure of the attorney to pay the sheriff must discharge the prisoner. (*See People ex rel. Friedman* agt. *McCue*, 18 *Hun*, 54.)
7. When complaint insufficient to authorize the issue by a justice of the peace of a warrant of. (*See Blodgett* agt. *Race*, 18 *Hun*, 132.)
8. Under the provisions of the act of 1867, "for the more effectual prevention of cruelty to animals," an officer of the American Society for the Prevention of Cruelty to Animals designated by the sheriff of a county as prescribed by said act (sec. 7), has authority to execute the law by the arrest of all offenders found violating it, and this he can do without first obtaining a warrant for the arrest from a magistrate. (*Davis* agt. *Am. Soc.*, etc., 75 *N. Y.*, 362.)
9. The statute does not require a special appointment from the

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sheriff for each arrest ; the agent designated is authorized to act under a general appointment until it is revoked ; and is clothed with authority to execute the law by the arrest of all offenders found violating it. (*Id.*)

10. *It seems*, that where a warrant is first obtained the person executing it will be protected whether the one arrested be proved guilty or innocent ; but if the statute alone is relied upon, the person making the arrest can have protection only by establishing that the person arrested was found violating the law. (*Id.*)

11. An equitable action cannot be sustained to restrain an officer of said society, appointed by a sheriff to make arrests, and who has threatened to arrest plaintiff for an alleged violation of said statute, from making such arrest, on the ground that the acts complained of were not a violation of the statute, and that plaintiff would suffer great damage in his business if the threat was carried into execution. (*Id.*)

ASSESSMENTS.

1. The provisions of the statute in relation to the levy and collection of local assessments must be strictly construed and followed. (*The People ex rel. Kerber et al. agt. The City of Utica, dec., ante, 136.*)
2. Where, by the city charter, it was provided as follows : Section 108 of the Utica city charter as revised in 1862 (*chap. 18, Laws of 1862*) which provides for the repairing of sewers, and the expense arising under that section is to be assessed and collected in the same manner as the expense of constructing a sewer is assessed and collected. The assessment and collection of the expense for the construction of sewers is provided for by second subdivision of section 99 of

the charter, which directs that three disinterested freeholders of the city shall be appointed by the common council to assess the expense of constructing sewers :

Held, that where the assessment was made by three individuals who do not appear to have been appointed assessors, nor do they appear to have been freeholders, as required by sections 99 and 108 of the charter, the assessment should be set aside and annulled. (*Id.*)

3. A person who, after the filing of the map changing the grade of a street, erects a building upon a lot fronting thereon, is not entitled to compensation for any damage sustained when the street is graded to conform with the new grade. (*The People ex rel. Murtaugh agt. Board of Assessors, ante, 327.*)
4. The board of assessors of the city of New York have power to alter or change the list of awards and assessments in cases of manifest error or mistake, even after the list has been advertised complete, and may do so of its own motion. (*Id.*)

ASSIGNMENT.

1. The rule that a covenant in a deed against incumbrances which is broken when the deed is delivered, does not pass like covenants that run with the land to a subsequent purchaser, as it is a chose in action which is not assignable, is no longer the law in this state. (*Boyd agt. Belmont, ante, 518.*)
2. Under the Code all choses in action are assignable, except those that, from their nature or because they are forbidden by law, cannot be assigned, such as the right to a revolutionary pension, the unearned salary of a public officer, the beneficial interest of a *cestui que trust* in certain cases, &c., and the action must be brought in the

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- name of the assignee, he being the real party in interest. (*Id.*)
3. The distinction between a covenant and a covenant broken is, therefore, no longer material in this state, the covenant, though broken, being assignable and suitable in the name of the assignee. (*Id.*)
 4. The covenant against incumbrances (now that the objection that chases in action are not assignable no longer exists) necessarily passes to the person to whom the land is conveyed, together with the land, because, if there be an incumbrance, it affects the value of the land, and, to the extent of the incumbrance, impairs the title. (*Id.*)
 5. Accordingly, where the plaintiff, by the sheriff's deed, acquired all the rights in the property which the defendant had conveyed to B., and when the plaintiff, to save her estate from the effect of the incumbrance, was compelled to pay it off, the defendant having refused so to do, *held*, that, she could maintain an action upon the covenant, which had passed to her with the land by assignment, to recover the damages she had sustained by the breach of it. (*Id.*)
 6. A creditor, named as such in the schedules, is not entitled to a distributive share of the trust funds without making presentation or proof of his claim. (*Matter of Accounting of Bailey, ante, 446.*)
 7. The statute (*Laws of 1877, chap. 468*) does not authorize indiscriminate distribution to all persons named as creditors in the schedules. The naming of a creditor in the schedule is not a presentation or proof of his claim within the meaning and intent of the statute. (*Id.*)
 8. If any person has a claim against the trust fund he should present and prove the same and invite an investigation as to its validity. Creditors who have fulfilled these requirements are the only ones entitled to share in the distribution of the fund. (*Id.*)
 9. If, as a matter of fact, it appears that the intent of the assignor in making the assignment was to enable him to make a compromise with his creditors, the assignment is fraudulent and void, though the terms of the instrument do not empower the assignee to make compromises, and where the authority to do the act is conferred in express terms by the assignment itself it must be equally void. (*McConnell agt. Sherwood, ante, 453.*)
 10. Where the assignee in an assignment is given the right to use this power, if, in *his* opinion, it would promote the interests of the assignor, his creditors and the assignee are not permitted to show that he did not intend to avail himself of this power, or use this discretion. (*Id.*)
 11. The doctrine applied to assignments, like other instruments and conveyances, is that if two constructions are possible, one of which renders the instrument void and the other renders it valid, that construction is to be adopted which makes it consistent with law. (*Id.*)
 12. Where the assignment to plaintiff was upon the following trusts and conditions: "First. To pay the costs and charges of these presents, and the expenses of executing the trust declared and set forth herein. To distribute and pay the remainder of said proceeds to all the creditors of the said party of the first part, for all debts and liabilities which the said party of the first part may be owing or indebted to any person, whatever; provided, however, that if there is not sufficient funds for the pay-

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ment of all the debts of the said party of the first part, then the said debts are to be paid *pro rata*, or in proportion to their respective demands." "Third. That the party of the second part may have the right to compromise with the creditors of the party of the first part, for all his debts and liabilities which the party of the first part may be owing or indebted to any person, or if, in the opinion of the second party, it would be advantageous to the party of the first part, and to the creditors of the party of the first part." Then follows the usual residuum clause in favor of the assignor. The assignment, also, contains a provision that the assignee, in collecting the notes and accounts may "*take a part for the whole when he shall deem it expedient*:"

Held, that this assignment should be construed as relating to the present tense and to the debts and liabilities of the assignor which existed or had been incurred at or before the making of the assignment.

Held, also, that assignment, in this instance, was void upon its face as calculated to hinder, delay and defraud the creditors of the assignor.

Held, further, that the assignment was void by reason of the provision contained in it that the assignee, in collecting the notes and accounts, may "*take a part for the whole when he shall deem it expedient*." (*Id.*)

18. Where the assignee, as he claims, with a view of aiding the sale of the balance of the stock, had purchased a small quantity of goods which he had added to the stock and which, at the time of the levy by the sheriff, was mingled with the residue of the stock and was being sold indiscriminately as part of the assigned stock; the sheriff was ignorant of the fact that any portion of the stock belonged to the plaintiff individually; at the time of the levy he made no claim

to the property except as assignee; he forbid the sale on the executions expressly in his character as the assignee, not claiming or pretending to have any other title to any of the property sold, nor but that the whole of the goods sold were portions of the goods assigned to him under the assignment:

Held, that the plaintiff is estopped from claiming, as against the sheriff, that he had any title to the goods which he claims to have purchased with his own money and to belong to him individually, and not as assignee. (*Id.*)

14. It is not necessary to an equitable estoppel that the party should design to mislead. If his act was calculated to mislead, and actually has mislead another who acted upon it in good faith, and in the exercise of reasonable care and diligence under all the circumstances, that is enough. (*Id.*)

15. The firm of H. & Co., executed a general assignment, under the state laws, to M. for the benefit of their creditors. Pending the administration of the estate, K., one of the late firm, brought this action against his former partners for an accounting and for judgment for alleged overdrafts:

Held, that by virtue of the assignment, the title to all the firm assets was vested in the assignee, who alone could sue for their recovery, and that his proceedings, as well as his powers and duties, are regulated by statute. And the facts above set forth appearing upon the face of the complaint; also, *held*, that the complaint exhibited a complete defense, and that a demurrer, because it does not state facts sufficient, &c., was well taken, and should have been sustained at special term. (*Kuehnemundt agt. Haar and Henqstler, ante, 464.*)

16. A general assignment is not vitiated by the insertion of a clause therein, authorizing the assignees

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"to compromise or compound any claim by taking a part for the whole, where they shall deem it expedient so to do." (*Ginther* agt. *Richmond*, 18 *Hun*, 232.)

ATTACHMENT.

1. A mere levy is not an actual application of the attached property to the payment of the judgment, under section 682 of the Code of Civil Procedure, so as to prevent a subsequent attaching creditor from applying to vacate the same as provided in this section. (*Woodmansee and Garside* agt. *Rodgers*, ante, 98.)
2. A final decree in accounting cannot be enforced by attachment. Such decree is only enforceable by execution. (*Matter of assignment of Stockbridge and Martin*, ante, 128.)
3. The last clause of section 5242, United States Revised Statutes, forbidding an attachment, injunction or execution to be issued against a national bank before final judgment in any proceeding in a state court, applies only to such banks as have committed or are contemplating an act of insolvency (*Robinson* agt. *National Bank of New Berne*, ante, 306.)
4. An attachment can, therefore, issue against a national bank, except under the above circumstances, from a state court, as provided by the Code of Civil Procedure. (*Id.*)
5. Where an attachment was granted May 13, 1879, the time to commence publication expiring on twelfth June, the publication not having been made until after that date:
Held, that, by that omission the attachment fell. (*Mofarietta and another* agt. *Suenz and others*, ante, 505.)
6. The requests of the defendant to suspend proceedings, received June fifth, by telegraph, and June twelfth, by letter, were not a substitute for service of the summons or commencement of publication, nor can they operate as an estoppel to preclude the defendants from setting up want of publication of service. (*Id.*)
7. A mere request to suspend legal proceedings is not sufficient to place the party who complies with it in the same position as if he had gone on with them. (*Id.*)
8. On the 12th of June, 1879, the plaintiffs applied for and obtained a second warrant of attachment, using for the purpose the same summons, complaint and affidavit, upon which the first warrant had been granted, but giving a new undertaking:
Held, that, as the thirty days had not expired when the second attachment was granted, the granting of the warrant gave the plaintiffs thirty days from that time to commence publication. (*Id.*)
9. *It seems* questionable whether the lapse of thirty days without publication of the summons ousts the jurisdiction of the court or abates the action, or merely avoids the attachment. (*Id.*)
10. *It seems* there is no reason why a plaintiff, after having obtained one warrant of attachment and order of publication, may not abandon them and take out a new attachment and order, provided this course is not pursued for the mere purpose of vexation, in which case he would be liable for the damages unnecessarily occasioned. (*Id.*)
11. Several attachments may be issued in the same action to different counties, and if one should be defective or fail for any reason, there is nothing which prohibits an application for a new one. (*Id.*)

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12. It is no objection that the same affidavit was used on the application for the second attachment which had been used on the application for the first. (*Id.*)
13. The objection that Rule 25 was not complied with by showing whether any former application had been made, if founded in fact, would be a mere irregularity which, if not regarded in the court below, would not be regarded here. Moreover, it is not specified in the notice of motion, and for that reason was not available to the appellants. (*Id.*)
14. A mere levy is not an actual application of the attached property under section 693 of the Code of Civil Procedure, so as to prevent a subsequent attaching creditor from applying to vacate the same as provided in this section (*affirming S. C., ante, 98.*) (*Woodmansee and Garside agt. Rodgers, ante, 439.*)
15. Where the levy is of goods, wares and merchandise, the actual application must be of the proceeds thereof after sale, to prevent the motion to vacate the attachment. (*Id.*)
- See RECEIVER.*
Killmer agt. Hobart and another, ante, 453.
16. As for a contempt cannot be issued by surrogate to enforce payment by executors of a sum of money directed to be paid by a decree made on a final accounting. (*See Seaman agt. Whitehead, 18 Hun, 64.*)
17. Sureties to an undertaking under section 688 of the Code of Civil Procedure — are not released by the discharge of their principal in bankruptcy. (*See McCombs agt. Allen, 18 Hun, 190.*)
18. The Mississippi Central Railroad Company issued its mortgage bonds, with coupons attached, and subsequently became consolidated with another corporation, payment of the bonds being assumed by the new company. On May 1, 1873, the treasurer of the latter company deposited with the defendants, Kelly & Alexander, \$25,000, they signing a receipt, stating that they had received it "in trust, to apply the same to the payment of an equal amount of the coupons of the first mortgage bonds and consolidated mortgage bonds of the Mississippi Railroad Company * * * the said money not to be subject to the control of the said company, otherwise than for the payment of said coupons, as above described."
- Held*, that such deposit created a trust for the benefit of the holders of the coupons of the said bonds, and that the fund was not liable to be attached in an action brought, by a creditor of the company depositing it, to enforce a debt due from it to him. (*Rogers Locomotive Works agt. Kelly, 19 Hun, 399.*)
19. The last clause of section 5242 of the United States Revised Statutes, in relation to national banks, providing that "no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court," only applies to such national banks as are described in the preceding part of the section, that is to say, such as have committed or are contemplating an act of insolvency, and does not prohibit the issuing of an attachment against the property of a solvent national bank, located and doing business in another state. (*Robinson agt. National Bank, 19 Hun, 471.*)
20. An affidavit, used on an application for an attachment, which fails to state that a certain sum is due to the plaintiff "over and

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above all counter-claims known to him," as required by subdivision 1 of section 636 of the Code of Civil Procedure, is fatally defective, and an attachment granted thereon will be set aside. (*Lyon agt. Blakesly*, 19 Hun, 299.)

21. Where an order granting an application under the Code (*new Code*, secs. 682, 683), by a lienor to vacate or modify an attachment, recites the reading of certain affidavits specified, including new affidavits on the part of plaintiff, without noticing any objections thereto, the only question for the general term, upon appeal, is whether, upon all the papers before the special term, its order was justified; and, upon appeal to this court, the lienor cannot raise the question, that plaintiff should have been confined to his original affidavits, and that affidavits supplying defects were improperly admitted on the hearing of the motion. (*Godfrey agt. Godfrey*, 75 N. Y., 434.)

22. *It seems*, that where such an application is based, in part, upon "proof by affidavits" attacking allegations in plaintiff's original affidavits, it is sufficient to let in new proofs on the part of plaintiff, although the allegations were not of material importance; the right of plaintiff to new proof does not depend upon the directness or force of the lienor's proof. (*Id.*)

23. Where, in an action by a judgment creditor upon an undertaking given to stay proceedings pending an appeal to this court, it appeared that at the time of the commencement of the action the judgment had been regularly attached at the suit of creditors of the judgment creditor, and the attachments were still in force, *held*, that the action could not be maintained, that the undertaking was simply a collateral security for the judgment and passed with

it to the sheriff; that it was not necessary to attach the undertaking separately, as it was an incident of the judgment, not an independent liability of the sureties. (*Wehle agt. Spellman*, 75 N. Y., 585.)

24. Upon the thirtieth day after the granting of a warrant of attachment, an order for the publication of the summons in this action was obtained, and it was published on the same day in one of the papers designated; it was delivered upon the same day to the other paper, but was not published until the next day. Copies of the summons and complaint were mailed to the defendants, as directed in the order, on the day it was granted:

Held (RAPALLO, MILLER and EARL, JJ., *dissenting*), that the publication of the summons was not commenced within thirty days after the granting of the attachment, within the meaning of section 638 of the Code of Civil Procedure (*new Code*); and that the attachment was properly vacated. (*Taylor agt. Troncoso*, 76 N. Y., 599.)

ATTORNEY AND CLIENT.

1. A petitioner alleged that he was retained as counsel by the appellant, who acted as attorney for the commissioners appointed to open a street; that it was agreed that the petitioner's fees and charges should be \$500; that they were taxed and certified at that amount; that the appellant undertook to, and did, collect that amount, but neglected and refused to pay it over, and the petitioner applied for an order that the attorney pay the money over to him. The attorney filed an answer denying all the allegations of the petition. This appeal was taken from an order appointing a referee to take proof as to the facts:

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Held, that the facts alleged showed that the relation existing between the parties was not that of attorney and client, but that of debtor and creditor, and that the controversy between them should be settled in an action, and not on a summary application to the court. (*Matter of Haskin*, 18 Hun, 42.)

2. Where an attorney has two clients, one of whom is enjoined, and the other who is in an independent position, having or claiming different rights or interests, is not enjoined, such attorney cannot ordinarily be charged with violation of the injunction in advising or acting professionally for the client not enjoined; his being enjoined as attorney for one client does not limit or restrain his professional action for others. (*Slater agt. Merritt*, 75 N. Y., 268.)
3. Where an attorney employed by a husband to bring a divorce suit enters into collusion with the wife to manufacture evidence, which if not wholly untrue is deceptive and thus to enable the husband to procure a divorce, this is an act of professional misconduct which authorizes an order disbarring the attorney. (*In re Gale*, 75 N. Y., 526.)

ATTORNEYS AND COUNSELORS.

1. The acknowledgment of an undertaking, executed in pursuance of the provisions of the Code of Civil Procedure, and the justification of the sureties therein, written thereon, are essential parts of the instrument (*Code of Civil Procedure*, secs. 810, 812). (*Bliss agt. Molter et al.*, ante, 112.)
2. The affidavits of justification of sureties, on an undertaking given to discharge an attachment, are affidavits made in the action and, if made before the attorney for

the defendant, the undertaking will not be approved or the discharge granted. (*Id.*)

3. Court stenographers are only entitled to charge to counsel for furnishing an official copy of the stenographic minutes of a trial *ten cents per folio of 100 words by actual count*; and on application of the attorney he will be ordered to write out his minutes and make out his bill at such rate. He cannot require an attorney to pay in advance for such copy. (*Wright agt. Nostrand et al.*, ante, 184.)
4. Attorneys as well as stenographers are officers of the court and subject to its orders; and in any case where it should be made to appear that an attorney had wrongfully refused to pay the legal charges of the stenographer, the court will protect the latter by a summary order against the attorney. (*Id.*)
5. The fee allowed by law to official stenographers of the court for furnishing a copy of the stenographer's minutes of a trial to counsel is *ten cents per folio* (*Following Wright agt. Nostrand*, post, 184). (*Guth agt. Dalton*, ante, 239.)
6. *It seems* that, under section 86, the stenographer may require payment of his fees in advance (*This is adverse to Wright agt. Nostrand*, post, 184). (*Id.*)
7. Where a judge knowingly permits to practice in his court a person not regularly admitted to practice, his judgment, rendered in a cause so conducted in violation of law, is void and will be reversed. (*Newburger et al. agt. Campbell*, ante, 313.)

BAIL.

See HABEAS CORPUS.

The People ex rel. Cowley agt. Bove, ante, 393.

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1. Where the sureties to an undertaking, given by a defendant on his arrest, fail to justify, on being excepted to by the plaintiff, the sheriff becomes liable as bail, and can only exonerate himself by re-arresting the defendant and holding him in actual custody. (*Douglas agt. Warren*, 19 Hun, 1.)
2. He cannot surrender him to a coroner, and any undertaking taken by the coroner on releasing him after such surrender is void. (*Id.*)

BILL OF PARTICULARS.

1. When plaintiff in an action to compel a trustee to account will not be required to furnish a bill of particulars showing the specific irregularities complained of. (*See Wigand agt. Dejonge*, 18 Hun, 405.)

BROKERAGE.

1. The defendant employed the plaintiff, a real estate broker, to purchase two lots for him. The broker conducted the negotiation until the owner finally agreed to accept \$32,000, net, for them. The owner told the broker that he would pay no commission on a sale at that price. The broker communicated these facts to his customer, who said the commission was a small matter and that he would see to it or take care of it. The matter remained in this condition for about one month, when the defendant went personally to the owner and completed the purchase at the net price given by the owner to the broker:

Held, that the purchaser was liable for the brokerage; that, as the defendant had not abandoned the intention of buying the lots, he could not ignore the broker's claim for commission by taking the matter in his own hands and continuing it where the broker left off, and that the broker's com-

pensation was earned when the purchase was definitely agreed upon. (*Lynch agt. McKenna*, ante, 42.)

BURDEN OF PROOF.

1. The fact that one of the parties to a contract is old, and is the grandfather and the employer of the other, does not raise a conclusive presumption of such an inequality between them as imposes upon the latter the burden of proving affirmatively that no deception was practiced, no undue influence used, and that all was fair, open, voluntary and well understood. While these relations are, as matter of fact, consistent with weakness and confidence on the one side, and strength and undue influence on the other, this is not necessarily presumable from the relations themselves, and it must be shown in order to impose this burden. (*Cowee agt. Cornell*, 75 N. Y., 91.)
2. In an action against a common carrier to recover for goods alleged to have been abstracted from packages delivered to him for transportation, which packages are duly delivered to the consignee, the burden is upon plaintiff to show that the goods were abstracted while the packages were in the possession of defendant, and before delivery; it is not sufficient to show a state of facts as consistent with the occurrence of the loss after as before the delivery. (*Canfield agt. B. and O. R. R. Co.*, 75 N. Y., 144.)
3. Upon a criminal trial the burden of proving that the offense charged was committed by a person responsible for his acts is upon the prosecution. The law, however, presumes that every individual is sane. Upon this presumption the prosecution may rest without proof, and in case the defense of insanity is interposed, it is for the

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- prisoner to establish it. If evidence is given tending to establish insanity, the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts; the prosecutor holding the affirmative; and if a reasonable doubt remains as to the sanity of the prisoner he is entitled to the benefit of it. (*Brotherton* agt. *People*, 75 N. Y., 159.)
4. The defense of insanity having been interposed the court charged, "this allegation of insanity is an affirmative issue which the defendant is bound to prove," but also, charged, if "there is a well-founded doubt whether this man was insane at the time he fired the pistol you will acquit him:"
Held, no error. (*Id.*)
 5. In an action against a warehouseman for refusal to deliver goods entrusted to him, where the refusal is explained by the fact appearing that the goods were lost by a burglary, the burden is upon the plaintiff to establish affirmatively that the burglary was occasioned by, or was not prevented by reason of some negligence or omission of due care on the part of defendant; the court will not assume in the absence of proof that the loss was the result of his negligence. (*Clafflin* agt. *Meyer*, 75 N. Y., 260.)
 6. The warehouseman in the absence of bad faith is only liable for negligence, and one bringing an action against him for the loss of goods must allege and prove negligence; this burden is never shifted; if plaintiff prove demand and refusal to deliver this unexplained is *prima facie* evidence of negligence; but if it appear that the goods have been lost by theft, plaintiff must show that the loss arose from the negligence of defendant. (*Id.*)
 7. Where, therefore, the facts proved are as consistent with due care as with the want of it, plaintiff cannot recover. (*Id.*)
 8. In an action upon a promissory note, where the makers allege and prove, that the note was executed for the accommodation of the indorser, and was by the latter fraudulently diverted from the use intended, the burden is upon the defendant to show that he is a *bona fide* holder for value, without notice. (*Nickerson* agt. *Ruger*, 76 N. Y., 279.)
 9. An erroneous ruling, as to the burden of proof, is not cured by the fact that the party, upon whom the burden is improperly imposed, ineffectually attempts to make a case under the ruling; he may rest upon his exception, but it is not waived or its force impaired by his attempting to comply with the erroneous ruling. (*Id.*)
 10. In an action upon a note the makers admitted the execution thereof by them, but denied the indorsement by the payee, and alleged that the note was not made for value, but was fraudulently obtained by the payee, and that the plaintiff was not a holder for value. On the trial plaintiff's bookkeeper, called by them as a witness to prove the indorsement, on cross-examination, testified, in substance, that he received the note before maturity, and that he gave nothing when he received it. On redirect-examination he testified, that for the note he surrendered, a short time after he received it, two other notes of the payees held by plaintiffs, which had been protested. Defendants offered to prove that the note was given without consideration, it having been sent by them to the payee to take up another note given as collateral security, for his accommodation, and that he did not take up the other note; this was objected to, upon the

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ground that defendants had not laid any foundation for the evidence, by showing that plaintiffs were not innocent holders for value. The objection was sustained.

Held, error; that if the offered proof had been made the burden would have been cast upon plaintiffs to show that they were *bona fide* holders for value; and that defendants did not lose the benefit of their exceptions by giving other evidence in an ineffectual attempt to lay a foundation for the rejected testimony in accordance with the ruling of the court. (*Id.*)

BURIAL PLOTS.

1. A religious corporation has full power, when they have parted with no rights by conveyance or contract, to control and regulate interments in the grounds which they hold for that purpose; and if the doctrines of the church of such corporation forbid the burial of the bodies of any other religious persuasion, they may properly, in such cases, exclude those therefrom. (*The People ex rel. Coppers agt. Trustees of St. Patrick's Cathedral, ante, 55.*)

2. In this case the defendants had entered into a contract or conveyance as follows: "Office of Calvary Cemetery, New York, December 1, 1873. Received from Mr. Denis Coppers, seventy-five dollars, being amount of purchase-money of a plot of ground, eight feet by eight, in Calvary Cemetery. D. Brennan, Superintendent, &c.:"

Held, that, looking at the objects and purposes for which the defendants held and owned the lands known as "Calvary Cemetery," and the language of the instrument, it is reasonably clear that the writing was intended to confer not merely the use of, or easement in, the land, for the purposes of burial, but to convey the

ownership of the soil, not for any and every use, but for the sole and only one of burying the dead.

Held, also, that where the owner of such a plot of ground had died, and his relatives sought to place his body in such plot, it is not in the power of such church corporation, to prevent its deposit therein, upon the ground that the deceased was of another religious persuasion, or for the reason that he was a member of the masonic or any other order. (*Id.*)

3. When vaults or burying lots have been conveyed by religious corporations, rights of property are conferred upon the purchasers. The right is like that to any other real estate, and it is as perfect without sepulture as it is where the grantee has used it for that purpose. (*Id.*)
4. *Mandamus* may properly issue where a religious corporation refuses or attempts to prevent the burial of a person in a plot of ground, for which he has paid the purchase-price and received a conveyance thereof from such corporation. It properly issues to compel a corporation to do that which, by law, it is required to do, especially when no other adequate remedy exists. (*Id.*)

CASE.

1. Under the Code of Civil Procedure, as well as under the old Code, the party desiring to appeal has, at least, an equal time to serve the case which he has to frame the exceptions which it is to contain, and any court rule abridging this time is inconsistent with the Code and inoperative. (*French agt. Powers, ante, 389.*)
2. The service of a copy of a referee's report and notice of filing on the plaintiff's attorney does not operate to limit the plaintiff's time to serve a case or exceptions. The

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time does not begin to run until the entry of judgment and notice thereof, and the plaintiff has ten days thereafter within which to serve a case and exceptions. (*Id*)

CASHIER OF BANK.

1. A cashier of a bank has no legal authority, by virtue of his position as such cashier, to compromise a claim of the bank, or to execute a composition agreement and release therefor. (*Chemical National Bank of New York agt. Kohner, ante, 267.*)
2. Such a power is discretionary, calling oftentimes for the exercise of considerable reflection and a high degree of judgment. It is strictly a sacrifice at least of nominal property of the bank, and is a function of the board of directors and not of an executive officer. (*Id.*)

CAUSES OF ACTION.

1. In an action brought by a creditor of a manufacturing corporation against a trustee for a liability imposed by the fifteenth section of the act of 1848 for the filing of a false report, the complaint should show that the debt, for which the defendant is sought to be made liable, was contracted while he was a trustee. (*Anderson agt. Speers, ante, 68.*)
2. Where the complaint alleged that the defendant was, on the 13th day of January, 1877, and "before that date," a trustee:
Held, not to be an averment that he was such trustee, in the year 1876, when the debt was alleged to be contracted. (*Id.*)
3. The filing of a false report on successive years gives rise to a separate cause of action as to each year. (*Id.*)

4. The allegations in one cause of action cannot be supplemented by those in another and separate cause in the same complaint, unless they are connected therewith by appropriate statements. *Victory Webb, &c., Company, agt. Beecher (55 How. P. R., 193), applied. (Id)*

CERTIORARI.

1. A writ of *certiorari* should not be allowed before a final order is made. (*Matter of Hamilton and Deane, ante, 290.*)

See PRACTICE.

The People ex rel. The Mayor agt. Nichols, ante, 200.

See POLICE COMMISSIONER.

The People ex rel. Nichols agt. Cooper, ante, 558.

2. Where a writ of *certiorari* was issued, requiring the common council of Long Island City to return its proceedings relating to levying and assessing a tax for interest of its water bonds, *held*, that no question, as to the validity or regularity of the bonds, could properly arise in the proceedings. (*Peo. ex rel. Woolsey agt. Com. Council, 76 N. Y., 20.*)
3. In proceedings by *certiorari*, to review an assessment made by the board of commissioners of taxes and assessments for the city and county of New York, wherein the board is successful, costs may be properly allowed, upon the ground that the writ is authorized by statute (*sec. 20, chap. 302, Laws of 1859*), to review and correct the action of the commissioners "on the merits," and so it may be denominated a "special proceeding." (*Peo. ex rel. Ins. Co. agt. Comrs, 76 N. Y., 65.*)
4. Plaintiff in error was tried and convicted, upon an indictment for grand larceny; after verdict he

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moved that judgment be arrested, on the ground that one of the justices of the court of sessions, before which he was tried, was disqualified to act as judge in the case, which motion was founded upon affidavits. The motion was denied. Upon writ of error to this court, *held*, that the motion could not be regarded as one in arrest of judgment, as such motion is based entirely upon some defect in the record; that it was, in fact, an application for a new trial; that the writs of *certiorari* from the supreme court brought up the record and all the papers upon said motion, and the affirmance of the judgment there ended the purpose and office of said writ; but that the writ of error from this court did not bring up the proceedings on the motion, as they were subsequent to the judgment and no part of the record. (*Hunt agt. People*, 76 N. Y., 89.)

CHATTEL MORTGAGE.

1. A chattel mortgage made the debt payable as follows, viz.: "The said principal sum and interest to be paid immediately at the expiration of five years from date, except in case default should be made in the performance of the conditions of a certain agreement this day executed by," &c. This agreement provided that the debt was to be paid in monthly installments of fifty dollars each:

Held, that the mortgage was not invalidated by the failure to record or file the agreement referred to. (*Shuler agt. Boutwell*, 18 Hun, 171.)

2. The giving of a second chattel mortgage upon the same property covered by a first one, to secure the same debt, is not of itself a cancellation of such first mortgage. (*Id.*)
3. Constructive possession cannot be taken under a chattel mortgage.

To be effectual actual possession in fact must be taken. (*Crandall agt. Brown*, 18 Hun, 461.)

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. The Code does not require the complaint, in an action for the claim and delivery of personal property, to be in any specific form; the only requirement in reference thereto is the general one, that it shall contain a plain and concise statement of the cause of action (*Old Code*, sec. 142; *new Code*, sec. 481). (*West. R. R. Co. agt. Bayne*, 75 N. Y., 1.)
2. Where a principal has executed and deposited with his agent negotiable obligations, to be issued by the latter in certain contingencies which do not occur, and the agent refuses to return them on demand, an action in equity may be maintained by the principal against the agent to compel a surrender of the obligations, and for damages arising from the detention, or, in case a surrender cannot be made, for the value of the instruments as valid obligations. (*Id.*)
3. Where a complaint contains the requisite allegations for such an action, that it avers some facts which the Code (section 207) requires shall be shown by affidavit, where a delivery is claimed, or that the alternative relief is asked, does not make the action one in replevin. (*Id.*)
4. Under an execution, in the usual form in an action for the claim and delivery of personal property, it is the duty of the sheriff to take and deliver the property as commanded, not only if he finds it in the possession of any person named therein, but also if he finds it in the possession of any other person; unless he can justify his refusal to do so by showing that such person

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has a title or right of possession superior to that of the party to whom he is commanded to deliver it. (*Hoffman agt. Conner, 76 N. Y., 121.*)

5. Where, therefore, to such an execution, the sheriff returned that he could not find the property so as to make delivery, and it appeared, in an action against him for a false return, that he knew where the property was within his county, and could have found it, but refused to take it or to take any action in regard thereto, upon the sole ground that it was in the possession of one M., held, that in the absence of proof that M. had any title to the property or right to the possession as against plaintiff, the sheriff was liable. (*Id.*)

CODE OF CIVIL PROCEDURE.

1. Sections 63, 64 — Where a judge knowingly permits to practice in his court a person not regularly admitted to practice, his judgment, rendered in a cause so conducted in violation of law, is void and will be reversed. (*Newburger et al. agt. Campbell, ante, 313.*)
2. Sections 86, 289 — Court stenographers are only entitled to charge to counsel for furnishing an official copy of the stenographic minutes of a trial *ten cents per folio of 100 words by actual count*; and on application of the attorney he will be ordered to write out his minutes and make out his bill at such rate. He cannot require an attorney to pay in advance for such copy.
Attorneys as well as stenographers are officers of the court and subject to its orders; and in any case where it should be made to appear that an attorney had wrongfully refused to pay the legal charges of the stenographer, the court will protect the latter by a summary order against the at-

torney. (*Wright agt. Nostrand et al., ante, 184.*)

3. Section 86 — *It seems* that, under this section, the stenographer may require payment of his fees in advance (*This is adverse to Wright agt. Nostrand, post, 184.*) (*Id.*)
4. Sections 110, 149, 574, 575, 591 — A defendant arrested and subsequently surrendered by his bail, is entitled to be discharged upon tendering a new bond similar in form to the one first given. The sheriff cannot compel him to give a limit bond before execution, except it be a case wherein bail to pay the debt is required. (*McCallum et al. agt. Barnard, ante, 169.*)
5. Section 111 — This section of the Code of Civil Procedure, provides that when, in the county of Kings, the sheriff has actually confined in jail a prisoner arrested by virtue of an execution, issued upon a judgment recovered in a court of record, he shall notify the attorney for the plaintiff, and the latter shall, within the time therein prescribed, pay to the sheriff the sum of twenty-five dollars for his support during the first twenty days, and that "if a payment required by this section be not made, the prisoner must be discharged."
Held, that this provision included the case of an execution issued in favor of a defendant as well as that of one issued in favor of a plaintiff.
That upon the failure of the attorney to make the required payment, the sheriff must at once discharge the prisoner, and that no order of the court was necessary to authorize him so to do. (*People ex rel. Riedman agt. McCue, 18 Hun, 54.*)
6. Sections 172, 587, 589, 595, 591, 592 — Where an action was commenced by plaintiff against the defendant and he was arrested by the sheriff, who took from him an

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undertaking signed by two sureties, who failed to justify on being excepted to:

Held, that upon the failure of the sureties to justify the sheriff became liable as bail. The sureties were not liable thereafter as bail, but they remained liable to the sheriff for all damages which he might sustain by reason of their omission to justify.

Where the sheriff is liable as bail he has all the rights and privileges, and is subject to all the duties and liabilities of bail. One of the rights and privileges of bail is, that they may surrender the defendant in their own exoneration. Such surrender, however, must be made to the sheriff.

When the sheriff seeks to exonerate himself from liability as bail by surrendering the defendant, he must rearrest him and surrender him to the custody of the jail. He cannot exonerate himself by surrendering him to the coroner, as the coroner has no right to receive him or to detain him in custody.

It is only when the sheriff is a party to the action, in which the order of arrest was issued, that the coroner is authorized to act. (*Douglas* agt. *Warren*, ante, 264.)

commencement of the action must govern; interest subsequently accruing cannot be considered, although the case is one where allowance of interest to the time of the trial is the ordinary incident of a recovery. (*Josuez* agt. *Conner*, 75 *N. Y.*, 156.)

10. Section 232 — Under this section of the Code of Civil Procedure, the justices of a judicial department may appoint the times and places for holding special terms. If, under this power, some terms are designated as "*special terms for equity cases and enumerated motions*," and others as "*special terms for non-enumerated motions and chambers business*," such designation, in so far as it limits the class of proceedings to be had at any special term, is subject to the control of the justice assigned to hold it. By designating a special term as one for non-enumerated motions and chambers business, the power of the judge presiding thereat cannot be limited. Such term would still be a special term, and the justice holding it would have all the powers of any judge holding any special term. (*The People ex rel. The Mayor* agt. *Nichols*, ante, 200.)
7. Section 184, subdivision 4 — When an advertisement of sale under a mortgage foreclosure is a "seizure" within the meaning of. (*See Union Dime Savings Inst.* agt. *Andariese*, 19 *Hun*, 310.)
8. Section 186 — Sheriff, power of, to sell under a decree in foreclosure after the expiration of his term of office. (*See Union Dime Savings Inst.* agt. *Andariese*, 19 *Hun*, 310.)
9. Section 191 — *It seems*, that under the provision of this section of the Code of Civil Procedure in regard to appeals to this court, in determining whether plaintiff's demand amounts to \$500, so as to authorize an appeal by him, the amount of that demand at the time of the
11. Section 289 — The fee allowed by law to official stenographers of the court for furnishing a copy of the stenographer's minutes of a trial to counsel is ten cents per folio (*Following Wright* agt. *Nostrand*, post, 184). (*Guth* agt. *Dalton*, ante, 289.)
12. Section 316 — Marine court of New York city cannot revive an action and continue it against an executor, as this section expressly provides that it shall not have jurisdiction of an action against an executor or administrator, in his representative capacity. (*See People ex rel. Egan* agt. *Marine Court*, 18 *Hun*, 333.)
18. Section 342 — County judge dis-

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- qualified from acting — proper mode of removing proceedings to supreme court. (*See Matter of Village of Rhinebeck*, 19 *Hun*, 346.)
14. Section 417 — In an action to foreclose a mortgage where the summons was accompanied by a notice of no personal claim, which was served upon the defendant H., whose name appeared in the notice, but not in the summons; the summons also failed to specify the office, post-office address or street number of the plaintiffs' attorney, and no reference thereto was made in the notice:
Held, that the words of this section of the Code of Civil Procedure were not mandatory, and that the omission was not a jurisdictional defect, but could be cured by amendment (*This is adverse to Osborn agt. McCloskey*, 55 *How.*, 345). (*Wiggins et al. agt. Richmond et al.*, *ante*, 376.)
15. Sections 421, 422 — The act of an attorney in subscribing himself as attorney for defendant to notice of motion, while probably sufficient to constitute an appearance for the purpose of waiving mere irregularities, is insufficient to entitle the attorney to notice of other and entirely different proceedings in the action.
 To require the service of notice of such proceedings, where no demurrer or answer has been served, a formal notice of appearance has been rendered necessary by the provisions of the Code of Civil Procedure. (*Douglas agt. Habestro*, *ante*, 276.)
16. Sections 421, 986 — Motion to change place of trial — cannot be made until after demand after appearance. (*See Van Dyck agt. McQuade*, 18 *Hun*, 376.)
17. Section 432, subdivision 3 — Who not managing agent of foreign corporation within meaning of, authorizing service of summons upon, for corporation. (*See Reddington agt. Mariposa L. and M. Co.*, 19 *Hun*, 405.)
18. Section 447 — When one interested in the controversy is entitled to be made a party to the action. (*See Haas agt. Craighead*, 19 *Hun*, 396.)
19. Section 452 — When one interested in the controversy is entitled to be made a party to the action. (*See Haas agt. Craighead*, 19 *Hun*, 396.)
20. Section 481 — The Code does not require a complaint, in an action for the claim and delivery of personal property, to be in any specific form; the only requirement in reference thereto is the general one, that it shall contain a plain and concise statement of the cause of action. (*Western R. R. Co. agt. Bayne*, 75 *N. Y.*, 1.)
21. Sections 538, 545, 546 — In an action brought by the wife against the husband for adultery where the defendant appeared and denied the adultery, and on the plaintiff's motion the defendant was ordered to pay a certain sum towards the expenses of the action, and upon demand being made the defendant neglected and refused *in toto* to comply with the order, upon proof of these facts the plaintiff moves for an order "striking out the defendant's answer and for an order of reference as in case of default:"
Held, that the motion should be denied. The only power possessed by the court to strike out a pleading, or to change and alter the same in any particular on a motion like this, is contained in these sections of the Code of Civil Procedure; and this is not a case within either of those sections. (*McCrea agt. McCrea*, *ante*, 220.)
22. Section 542 — Plaintiff served her complaint, and just before time for answering expired the defendant served a notice of mo-

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tion to strike out certain irrelevant allegations of the complaint and to compel plaintiff to separately state and number the counts of the complaint. Before time to answer had expired, plaintiff served an amended complaint, complying with the requirements of defendant's motion, which defendant refused to receive unless costs of motion were paid, which plaintiff declined to pay:

Held, that, under this section of the Code of Procedure, plaintiff should not be required to pay costs of motion.

The words "without prejudice to the proceedings already had" were not designed to compel a party who had committed an error in his pleadings to pay costs of one amendment, and thereby nullify the right which had been secured to him by the statute, of "once amending his pleading, of course, without costs." (*Welch* agt. *Preston et al.*, ante, 52.)

23. Section 549—In an action brought to recover a debt owing the plaintiff by an association, upon the statute making the trustees of the association who fail to file a report liable for the debts of the association:

Held, that, the liability to pay such debt is not a fine or penalty in the sense in which those terms are used in subdivision 1 of this section of the Code of Civil Procedure, so as to subject the party to arrest.

To subject a party to arrest the cause of action must be a fine or penalty, and not something of a penal character. (*Glen's Falls Paper Company* agt. *White*, ante, 172.)

24. Section 550, subdivision 4—What facts do not authorize an arrest under. (*See Genesee River National Bank* agt. *Mead*, 19 *Hun*, 303.)

25. Section 604—When injunction issuable under after a sale in fore-

closure. (*See Mut. Life Ins. Co. agt. Nat. Bank of Newburgh*, 18 *Hun*, 371.)

26. Section 620—Where, in an action in which a preliminary injunction was issued, judgment was rendered in favor of defendant, and plaintiff duly appealed therefrom, giving the proper undertaking:

Held, that defendant was not entitled, pending the appeal, to an order to assess his damages by reason of the injunction; as there was no final decision that plaintiff was not entitled thereto (*Old Code*, sec. 223; *new Code*, sec. 620). (*Musgrave* agt. *Sherwood*, 76 *N. Y.*, 194.)

27. Section 630—Under this section of the Code of Civil Procedure, upon a hearing of a contested application for an injunction order, or to vacate or modify such an order, a verified answer has the effect only of an affidavit.

Under this section the court has the power to determine the weight to be given to the denial contained in the answer, in the same manner and to the same extent as it has to determine other questions arising upon conflicting affidavits.

Where the answer alleged that "the defendant denies each and every allegation in the complaint contained, and not hereinafter specifically admitted or denied, or not hereinafter specifically admitted or avoided:"

Held, that a denial in this form is neither a general or specific denial, and is a form of denial in no way provided for by the present system of pleading. (*McEncroe* agt. *Decker*, ante, 250.)

28. Sections 636-707—The last clause of section 5242, United States Revised Statutes, forbidding an attachment, injunction or execution to be issued against a national bank before final judgment in any proceeding in a state court, applies only to such banks as have com-

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mitted or are contemplating an act of insolvency.

An attachment can, therefore, issue against a national bank, except under the above circumstances, from a state court, as provided by the Code of Civil Procedure. (*Robinson* agt. *National Bank of New Berne*, ante, 806.)

29. Section 686, subdivision 1—Affidavit on application for attachment must state that a certain sum is due "over and above all counter-claims" as required by—or is fatally defective. (*See Lyon* agt. *Blakesly*, 19 *Hun*, 299.)

30. Section 688—Upon the thirtieth day after the granting of a warrant of attachment, an order for the publication of the summons in this action was obtained, and it was published on the same day in one of the paper designated; it was delivered upon the same day to the other paper, but was not published until the next day. Copies of the summons and complaint were mailed to the defendants, as directed in the order, on the day it was granted:

Held (RAPALLO, MILLER and EARL, JJ., dissenting), that the publication of the summons was not commenced within thirty days after the granting of the attachment, within the meaning of this section of the Code of Civil Procedure; and that the attachment was properly vacated. (*Taylor* agt. *Troncoso*, 76 *N. Y.*, 599.)

31. Section 682—A mere levy is not an actual application of the attached property to the payment of the judgment, under this section of the Code of Civil Procedure, so as to prevent a subsequent attaching creditor from applying to vacate the same as provided in this section. (*Woodmansee and Garside* agt. *Rodgers*, ante, 98.)

32. Section 682—A mere levy is not an actual application of the at-

tached property under this section of the Code of Civil Procedure, so as to prevent a subsequent attaching creditor from applying to vacate the same as provided in this section (*affirming S. C.*, ante, 98).

Where the levy is of goods, wares and merchandise, the actual application must be of the proceeds thereof after sale, to prevent the motion to vacate the attachment. (*Woodmansee and Garside* agt. *Rodgers*, ante, 439.)

33. Sections 682, 688—Where an order granting an application under these sections of the Code by a lienor to vacate or modify an attachment, recites the reading of certain affidavits specified, including new affidavits on the part of plaintiff, without noticing any objections thereto, the only question for the general term upon appeal is whether, upon all the papers before the special term, its order was justified; and, upon appeal to this court, the lienor cannot raise the question that plaintiff should have been confined to his original affidavits, and that affidavits supplying defects were improperly admitted on the hearing of the motion. (*Godfrey* agt. *Godfrey et al.*, 75 *N. Y.*, 434.)

34. Section 688—The defendants became sureties to an undertaking, given under this section of the Code of Civil Procedure, to procure the discharge of an attachment against one McCrillis. Within four months from the issuing of the attachment McCrillis filed a petition in voluntary bankruptcy, and procured his discharge therein. The plaintiff in the attachment suit having prosecuted his claim to judgment, assigned his claim to the plaintiff, who brought this action to recover on the undertaking:

Held, that the defendants were liable thereon, and were not released by the discharge of McCrillis in bankruptcy. (*McCombs* agt. *Allen*, 18 *Hun*, 190.)

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35. Section 729, 730—The undertaking required by the Code of Civil Procedure is amendable. And where the undertaking, on which the order of arrest was granted, is in the form required by the old Code of procedure, the defect is cured by the execution and service of a new undertaking which conforms to the requirement of the Code of Civil Procedure, and a motion to vacate the order of arrest will be denied on proof of the execution and service of new undertaking by the same sureties before the motion is heard. (*Pember* agt. *Schaller*, ante, 511.)

36. Section 738—Entry of judgment on acceptance of an offer—when it bars a recovery for claims set up in the complaint, but not included in the offer or judgment. (*See Robinson* agt. *Marks*, 19 *Hun*, 325.)

37. Section 738—*It seems*, also, that where a debtor, against whom actions have been commenced by different creditors, serves an offer of compromise under the Code (*old Code*, sec. 385; *new Code*, sec. 738) in the action last commenced, and thus enables the plaintiff therein, by accepting the same, to perfect his judgment in advance of the creditor who first brought suit, and to obtain a preference in the payment of his debt, this is not such a fraud as will authorize the setting aside of the judgment so obtained; the giving of a preference to one creditor over another is not unlawful. (*Beards et al.* agt. *Wheeler*, 76 *N. Y.*, 213.)

38. Section 780—There is no absolute right to a notice of eight days on enumerated motions. A shorter notice may be prescribed by a judge or court, under this section of the Code, and Rule 37 of the supreme court. The exercise of this power is subject to review.

Bringing on for hearing a *cer-*

tiorari upon the return thereto, is like a motion for judgment on the pleadings, on the ground that the answer raises no issue of fact, and it would present a question of law only. Such motion is of the class called *non-enumerated*, as defined by supreme court Rule 38.

Rule 44 of the supreme court, which provides that a case on *certiorari* may be brought to a hearing "upon the usual notice of argument at special term," is controlled by this section of the Code, which authorizes the judges to prescribe a notice of less than eight days. (*The People ex rel. The Mayor* agt. *Nichols*, ante, 200.)

39. Sections 787, 788—Under the provision of the Code of Civil Procedure (*new Code*, sec. 1223), declaring that judgments on the decision of the court may be entered "after the expiration of four days from the filing of the decision, * * * and the service upon the attorney of the adverse party of a copy thereof, but not before," four full calendar days must elapse after the filing of a decision and notice thereof before judgment can be properly entered.

The rule of interpretation which, in computing time, excludes the first and includes the last day has no application, where as here the provision is clear and explicit.

Nor has the provision of said Code (sec. 788), which declares a like rule for computing the time within which an act in an action or special proceeding is required to be done any application; 1st. because it refers to the preceding section (sec. 787); 2d. It excepts cases where the law makes other provision; 3d. It relates to the time within which an act is required to be done, not to a period after the expiration of a specified time; 4th. The two sections have no connection, and this one was not designed to limit the operations of the other.

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hour itself is material, as where the priority of judgments is in question. (*Marvin* agt. *Marvin*, 75 N. Y., 240.)

40. Section 791, subdivision 8 — What are preferred causes within. (*See Studwell* agt. *Charter Oak Ins. Co.*, 19 Hun, 127.)

41. Sections 810-812 — The acknowledgment of an undertaking, executed in pursuance of the provisions of the Code of Civil Procedure, and the justification of the sureties therein, written thereon, are essential parts of the instrument. (*Bliss* agt. *Molter et al.*, ante, 112.)

42. Section 829 — In an action for goods sold and delivered, where the defense was payment, the plaintiff being the survivor of the firm, the defendant cannot be allowed to testify over plaintiff's objections that he paid the bill in question to the deceased partner.

And this, although the plaintiff, after testifying in his own behalf to the sale and delivery of the goods; also testified, without objection, that no part of the bill had ever been paid. (*Pettit* agt. *Gessler*, ante, 195.)

43. Section 829 — The defendant entered into an oral agreement with one Titus to work a farm belonging to the latter upon shares, upon certain terms. Subsequently Titus died, leaving the farm and all the implements thereon to his wife. Thereafter the defendant agreed with the wife, the plaintiff, to work the farm upon the same terms that he had worked it on for her husband.

In an action by the plaintiff to enforce the latter agreement, *held*, that the testimony of the defendant, as to the terms of the agreement made with the deceased, was admissible as against the plaintiff. (*Titus* agt. *O'Connor*, 18 Hun, 373.)

44. Section 829 — Where, on an application by a child for his share of his father's estate, the executors claim to deduct a sum alleged to have been advanced to him by the deceased, and to prove such advancement, put in evidence an entry made by the testator in one of his books, the child is entitled, under this section of the Code of Civil Procedure, to testify in reference to such advancement, and explain or deny such entry. (*Marsh* agt. *Brown*, 18 Hun, 319.)

45. Section 829 — In an action against the surviving partner of a firm, upon a contract made with it, the plaintiff is a competent witness to testify to a personal transaction had with the deceased partner, if the defendant was present at the time of its occurrence. (*Kale* agt. *Elliott*, 18 Hun, 198.)

46. Section 829 — The plaintiff presented to the defendants, as executors, a claim for services rendered to their testator, the plaintiff's father. Upon the trial on a reference, under the statute, a sister of the plaintiff, who was also a legatee under the will, and her husband, were allowed, against the defendants' objection and exception, to testify as to the employment of the plaintiff by the testator, and as to his promise to pay her wages for her services:

Held, that the evidence was properly received. (*Purell* agt. *Fry*, 19 Hun, 595.)

47. Section 829 — When the testimony of one defendant to a joint and several note, in behalf of his codefendant not excluded by. (*See Ely* agt. *Clute*, 19 Hun, 35.)

48. Section 831 — Although the amendment made to this section of the Code of Civil Procedure, in 1879, is very broad, *it seems* such amendment has not removed the

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- restriction heretofore imposed by statute, as to parties to an action for a divorce testifying in their own behalf. (*Hennessey* agt. *Hennessey*, ante, 804.)
49. Section 834 — Information acquired by a physician while attending a patient — when he is not prevented from testifying in respect thereto. (*See Pierson* agt. *People*, 18 *Hun*, 289.)
50. Section 834 — Probate of the second codicil of the testator's will, by which the respondent was appointed one of his executors, was opposed by his three daughters and one other legatee, on the ground that he was incompetent to execute a will at the time of its date, and also on the ground of undue influence exerted by the respondent. Upon the hearing, the contestants called the physician who had attended the deceased for eight years previous to his decease, for the purpose of showing that he was incompetent to make a will at the time of executing the codicil. The physician having stated that all his knowledge was derived from what he observed while he was attending the deceased professionally, his evidence was excluded by the surrogate:
Held, that the evidence was not prohibited by this section of the Code of Civil Procedure, as being information acquired while attending the deceased professionally, and which was necessary to enable him to do so.
 That even if the prohibition therein contained were applicable, the contestants, as the personal representatives of the deceased, might waive it. (*Staunton* agt. *Parker*, 19 *Hun*, 55.)
51. Section 964 — Providing that an issue of law arises only upon a demurrer, has no application to proceedings by *certiorari*. (*See People ex rel. The Mayor* agt. *Nichols*, 18 *Hun*, 530.)
52. Sections 986, 421 — Motion to change the place of trial — cannot be made until after demand after appearance. (*See Van Dyck* agt. *McQuade*, 18 *Hun*, 376.)
53. Sections 994, 997, 998 — Under the Code of Civil Procedure, as well as under the old Code, the party desiring to appeal has, at least, an equal time to serve the case which he has to frame the exceptions which it is to contain, and any court rule abridging this time is inconsistent with the Code and inoperative.
 The service of a copy of a referee's report and notice of filing on the plaintiff's attorney does not operate to limit the plaintiff's time to serve a case or exceptions. The time does not begin to run until the entry of judgment and notice thereof, and the plaintiff has ten days thereafter within which to serve a case and exceptions. (*French*, agt. *Powers*, ante, 389.)
54. Sections 997, 998, 999, 1002 — A motion for a new trial, made upon the minutes of the judge presiding at the trial, can only be made before him at the same term in which the trial was had.
 For the purposes of such motion, it is not necessary to make a case. The proceedings being fresh, the judge's minutes are presumed to disclose the error, if any exists.
 When a motion for a new trial is made at special term, it should be founded upon a case made and settled according to the rules and practice of the court. In no other way can it be well determined by a judge, other than the one who tried the cause, what transpired at the trial and what questions distinctly arose.
 An omission to move for a new trial on the minutes during the trial term, under section 999 of the Code of Civil Procedure, cannot be cured by a subsequent direction of the judge before whom the trial was had, after the end of the term, that such motion be

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made at the special term upon the minutes of the judge who presided at the trial. (*The Thayer Manufacturing Jewelry Company* agt. *Steinau*, ante, 815.)

55. Section 1008 — *Quare*, whether, under the last clause of this section, a party in an equity case is not bound by the verdict if he fails, before final judgment, to move to set it aside and for a new trial. (*Chapin* agt. *Thompson*, ante, 46.)

56. Section 1218 — Is only applicable to judgments by default. (*See Newins* agt. *Baird*, 19 *Hun*, 306.)

57. Section 1228 — Under the provision of the Code of Civil Procedure declaring that judgments on the decision of the court may be entered "after the expiration of four days from the filing of the decision, * * * and the service upon the attorney of the adverse party of a copy thereof, but not before," four full calendar days must elapse after the filing of a decision and notice thereof before judgment can be properly entered.

The rule of interpretation which in computing time excludes the first and includes the last day has no application, where, as here, the provision is clear and explicit.

Nor has the provision of said Code (*sec.* 788), which declares a like rule for computing the time within which an act in an action or special proceeding is required to be done any application; 1st. Because it refers to the preceding section (*sec.* 787); 2d. It excepts cases where the law makes other provision; 3d. It relates to the time within which an act is required to be done, not to a period after the expiration of a specified time; 4th. The two sections have no connection, and this one was not designed to limit the operations of the other.

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where the hour itself is material, as where the priority of judgments is in question. (*Marvin* agt. *Marvin*, 75 *N. Y.*, 240.)

58. Sections 1240, 14 — A final decree in accounting cannot be enforced by attachment. Such decree is only enforceable by execution. (*Matter of assignment of Stockbridge and Martin*, ante, 128.)

59. Section 1279 — Under the provision of the Code of Civil Procedure (*new Code*, *sec.* 1279), providing for the submission of a controversy upon facts admitted, the facts agreed upon must be such as will enable the court to render the proper judgment, and the submission must be by the parties to be affected thereby. (*Dickinson et al.* agt. *Dickey et al.*, 76 *N. Y.*, 602.)

60. Sections 1300, 1334, 1326 — Under the Code of Civil Procedure (*new Code*, *sec.* 1300), a notice of appeal to this court may be served before any undertaking has been executed, and the undertaking may be given at any time before the expiration of the time for appealing (*sec.* 1334); but the notice does not become effectual for any purpose until the undertaking has been given (*sec.* 1326). (*Raymond* agt. *Richmond*, 76 *N. Y.*, 106.)

61. Section 1317 — Where there has been a series of orders connected with the same matter, so that if one is erroneous all are, upon appeal from one the general term is authorized to reverse the whole, so as to leave the records of the court clear and consistent.

The provision of the new Code (*sec.* 1317), in reference to, and so far as it affects, this point, does not differ from the old (*sec.* 330). (*Stanton* agt. *King*, 76 *N. Y.*, 585.)

62. Sections 1325, 1326, 1327 — Where the sureties to an undertaking upon appeal to this court from a final judgment fail to justify, the

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appellant may give a new undertaking at any time within the year allowed for appeal, and when given the appeal becomes effectual; and if the respondent fails to except to the sureties within the time allowed, the new undertaking becomes perfect for the purposes of the appeal. (*Blake* agt. *L. and F. M. Co.*, 75 N. Y., 611.)

63. Section 1838—Where in an order of general term, reversing a judgment entered upon a decision of the court on trial without a jury, it is not stated that the reversal was upon questions of fact, the reversal to be sustained in this court must be justified by some error of law, the opinion cannot be looked to to ascertain the ground of the reversal; if upon the facts, it must appear in the body of the order. (*Van Tassel* agt. *Wood*, 76 N. Y., 614.)

64. Section 1842—Order of county court dismissing an appeal for defects in the notice is appealable. (*See Andrews* agt. *Long*, 19 Hun, 808.)

65. Section 1843—Order adjudging party guilty of contempt appealable under. (*See Newell* agt. *Cutler*, 19 Hun, 74.)

66. Section 1849—A decision of the court, sustaining or overruling a demurrer, is an order, not an interlocutory judgment; and, as in the provision of the Code of Civil Procedure specifying appealable orders, this is not enumerated, an appeal to the general term from such a decision does not lie. It can only be reviewed on appeal from a final judgment entered thereon. (*Cambridge Valley Nat. Bank* agt. *Lynch*, 76 N. Y., 514.)

67. Section 1872—An execution against the person, which recites that an execution has been issued to the proper county, and returned unsatisfied is insufficient. It must specify the county *eo nomine*,

and if it does not, the defendant may be discharged on *habeas corpus*. (*The People ex rel. Brack* agt. *Reilly*, ante, 218.)

CODE OF PROCEDURE.

1. Section 34—The court of common pleas of the city and county of New York has no jurisdiction to entertain an appeal from an order of the marine court, except it be an order granting a new trial (*Old Code*, secs. 34, 352, 354; sec. 9, chap. 545, *Laws of 1874*; sec. 43, chap. 479, *Laws of 1875*).

The word "judgment," as used in the provision of the Code of Procedure (sec. 34), conferring appellate jurisdiction upon the court of common pleas, was used in its usual sense, and does not include determinations not resulting in judgments.

Accordingly, *held*, that an order of the general term of the marine court, granting a perpetual stay of proceedings, was not appealable to the common pleas. (*Bamberg et al.* agt. *Stern*, 76 N. Y., 555.)

2. Section 56—Undertaking given on a plea of title in the justices' court of Buffalo—form of. (*See Kohlbrenner* agt. *Elsheimer*, 19 Hun, 88.)

3. Section 88—Statute of limitations—exemption of married women from—not taken away until the passage of chapter 741 of 1870. (*See Clark* agt. *McCann*, 18 Hun, 13.)

4. Section 111—B. having oral authority from plaintiffs to lease certain premises owned by them, executed in his own name, adding thereto the word "agent," a lease under seal, in which he described himself as "agent and party of the first part," but without stating for whom he acted as agent. In an action upon the lease, *held*, that in the absence of proof that the

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- lessee had knowledge that such agent was acting for the owners, or had recognized their rights, and in the absence of an assignment of the lease, said owners could not maintain an action thereon in their own name to recover rent accruing thereunder; that such an action was not authorized by the provision of the Code (*old Code, sec. 111*) requiring an action to be prosecuted in the name of the real party in interest, as the parties executing such an instrument are the real parties in interest, they only being bound thereby; also that the contract could not be regarded as a simple contract and the seal rejected as surplusage. (*Schaefer agt. Henkel, 75 N. Y., 878.*)
5. Section 132—Where, after the filing of a notice of *lis pendens* in accordance with this section of the Code of Procedure, and service of summons upon one or more of the defendants in an action for the foreclosure of a mortgage, a judgment is perfected and docketed against the owner of the equity of redemption, the judgment creditor is bound by the judgment in the foreclosure suit, the same as if he were a party thereto; and this, although, at the time of the entry of his judgment, said owner had not been served with summons in the foreclosure suit. The judgment creditor is a subsequent incumbrancer within the meaning of said section (*Rogers agt. Bonner, 45 N. Y., 870, distinguished*). (*Fuller et al. agt. Scribner et al., 76 N. Y., 190.*)
6. Section 142—The Code does not require a complaint, in an action for the claim and delivery of personal property, to be in any specific form; the only requirement in reference thereto is the general one, that it shall contain a plain and concise statement of the cause of action. (*West. R. R. Co. agt. Bayne et al., 75 N. Y., 1.*)
7. Section 163—To make a complaint good under the provision of this section of the Code of Procedure, providing that in an action upon an instrument for the payment of money, it shall be sufficient to set forth a copy of the instrument and to allege that a specified sum is due thereon, the instrument so set forth must, upon its face, be a complete, valid and binding obligation. Where it is, upon its face, incomplete and invalid, and facts not stated in it, need to appear to show its validity, such other facts must be alleged. Where a complaint upon a bond shows it to be the obligation of a married woman, it is essential to allege that it was given for some purpose, which would make it binding upon her; it is *prima facie*, a nullity, and without such averments the complaint does not state a cause of action. The complaint herein alleged that defendants executed their bond under seal, a copy of which was set forth, and alleged that there was due plaintiff a specified sum thereon, for which judgment was demanded. The bond was joint and several; in it the obligors are described as husband and wife, as they are also in the title of the cause. Defendants demurred separately. *Held*, that as to the husband, the complaint was good and the demurrer was frivolous; but that, as to the wife, a cause of action was not stated, and her demurrer was well taken. *Broome agt. Taylor (9 Hun, 155), reversed as to defendant Helen M. Taylor. (Broome agt. Taylor et al., 76 N. Y., 564.)*
8. Section 167—The provision of this section of the Code, authorizing the joinder of causes of action, legal and equitable, by implication prohibits the union of a cause of action for the enforcement of a lien with one for the collection of a debt, except in the

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case of a mortgage secured by bond or other obligation of the mortgagor or a third person. (*Burroughs et al. agt. Tostevan et al.*, 75 N. Y., 567.)

9. Section 222—Where, in an action in which a preliminary injunction was issued, judgment was rendered in favor of defendant, and plaintiff duly appealed therefrom, giving the proper undertaking:

Held, that defendant was not entitled, pending the appeal, to an order to assess his damages by reason of the injunction: as there was no final decision that plaintiff was not entitled thereto (*Old Code*, sec. 222; *New Code*, sec. 620). (*Musgrave agt. Sherwood*, 76 N. Y., 194.)

10. Section 222—An order of reference to ascertain the damages sustained by defendant, by reason of an injunction, recoverable upon an undertaking given under this section of the Code of Procedure, cannot be granted until it has been determined by judgment or other decision of the court that plaintiff was not entitled to the injunction; it is not sufficient that this appears by the facts developed upon the trial. (*Benedict agt. Benedict*, 76 N. Y., 600.)

11. Section 272—Under the provision of this section of the old Code giving to a referee the same power as the court to allow amendments to pleadings on trial, a referee had power on application to amend the complaint on trial, not simply so as to conform it to the proof, but by inserting material allegations as to which no proof had been given, to impose as a condition to the granting of the application that defendant be permitted to answer or demur to the amended complaint. (*Smith et al. agt. Rathbun et al.*, 75 N. Y., 122.)

12. Section 292—Upon the trial of an indictment for conveying prop-

erty with intent to defraud the grantor's (the prisoner's) creditors, the district attorney was allowed to prove that the prisoner had been examined in supplementary proceedings, and that his signature to the examination, which was produced in court, was genuine. The district attorney then read from the examination, and asked the prisoner whether the statements so read, or those which he had made upon the trial, were true. These questions were allowed against the objection and exception of the prisoner's counsel:

Held, that the evidence was inadmissible under Code, section 292. (*Loomis agt. People*, 19 Hun, 601.)

13. Section 292—In an action for partition by a receiver appointed in supplementary proceedings the complaint alleged in substance that by an order duly made May 22, 1876, by the county judge of U. county in such proceedings, plaintiff was appointed receiver, &c., that such order was recorded in said county, that the real estate was situate therein, and that the judgment debtor acquired title on or about April 23, 1876. There was no allegation that the judgment roll was filed, or that the judgment debtor resided in that county, or that the order or a certified copy thereof was filed and recorded in the office of the clerk of the county where the judgment roll was filed or where the judgment debtor did reside:

Held, that a demurrer to the complaint was properly sustained as the conditions prescribed by this section of the Code which must exist before title to real estate vests in the receiver, did not appear. (*Dubois agt. Cassidy*, 75 N. Y., 298.)

14. Section 297—What personal earnings of debtor cannot be reached by receiver appointed in supplementary proceedings. (*See Miller agt. Hooper*, 19 Hun, 394.)

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15. Section 307, subdivision 5—What costs are allowable on an appeal from an order overruling a demurrer. (*See Wright agt. Flemming*, 18 Hun, 360.)
16. Section 309—Only one extra allowance recoverable. (*See Flynn agt. Equitable Life Assurance Society*, 18 Hun, 212.)
17. Section 321—An assignment of a cause of action, made simply as collateral to an indebtedness of the assignor to the assignee, is not such a transfer as makes the assignee liable for costs under the provision of this section of the Code declaring that when, after the commencement of an action, the cause of action by assignment or otherwise becomes the property of a person not a party to the action, such person shall be liable for costs; it is not a transfer of the absolute property within the meaning of said provision. (*Peck agt. Yorks et al.*, 75 N. Y., 421.)
18. Section 348—An action cannot be maintained upon an undertaking, given under this section of the old Code, upon appeal to the general term, without proof of service upon respondent, ten days before the commencement of the action, of a written notice of the entry of the order or judgment affirming the judgment appealed from. (*Rae agt. Beach et al.*, 76 N. Y., 164.)
19. Section 349, subdivision 2—What costs are allowable on an appeal from an order overruling a demurrer. (*See Wright agt. Flemming*, 18 Hun, 360.)
20. Sections 352, 354—The court of common pleas of the city and county of New York has no jurisdiction to entertain an appeal from an order of the marine court, except it be an order granting a new trial (*Old Code*, secs. 34, 352, 354; *sec. 9, chap. 545, Laws of* 1874; *sec. 43, chap. 479, Laws of* 1875).
- The word "judgment," as used in the provision of the Code of Procedure (*sec. 84*), conferring appellate jurisdiction upon the court of common pleas, was used in its usual sense, and does not include determinations not resulting in judgments.
- Accordingly, *held*, that an order of the general term of the marine court, granting a perpetual stay of proceedings, was not appealable to the common pleas. (*Bamberg et al.*, *agt. Stern*, 76 N. Y., 555.)
21. Section 385—It seems, also, that where a debtor, against whom actions have been commenced by different creditors, serves an offer of compromise under the Code (*old Code*, *sec. 885*; *new Code*, *sec. 788*) in the action last commenced, and thus enables the plaintiff therein, by accepting the same, to perfect his judgment in advance of the creditor who first brought suit, and to obtain a preference in the payment of his debt, this is not such a fraud as will authorize the setting aside of the judgment so obtained; the giving of a preference to one creditor over another is not unlawful. (*Beards et al. agt. Wheeler*, 76 N. Y., 213.)
22. Section 399—When the testimony of party as to a personal transaction with a deceased person is not incompetent under. (*See Severn agt. National State Bank of Troy*, 18 Hun, 228.)

COMMISSIONERS.

1. Where a railroad corporation desires to cross or intersect the railroad and grounds of another company, and they cannot agree upon a compensation or mode of crossing, upon a petition showing such facts, which are undenied, the petitioners are entitled to an

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order for the appointment of commissioners to determine the points and manner of crossing (*Laws of 1850, chap. 140, sec. 28, subd. 6.*) (*Boston, Hoosic Tunnel and W. R. R. Co. agt. Troy and Boston R. R. Co., ante, 167.*)

2. If the objection to such application be that the need of a crossing may be avoided by another location, proceedings should be taken under section 22 of the railroad act to change the route. (*Id.*)

3. The language of the statute is, that the commissioners shall decide "the point and manner" of the crossing, thus necessarily committing some discretion to them as to the spot of the crossing and the mode of its accomplishment. (*Id.*)

COMPLAINT.

1. Where a complaint, in an action to foreclose a mortgage executed by the defendant, as executor, alleges that he executed it as such executor:

Held, that the complaint was sufficient, and that it was unnecessary to allege the defendant's appointment as executor; he is presumed to be such as he has described himself. (*Kingsland agt. Stokes, ante, 1.*)

2. Plaintiff served her complaint, and just before time for answering expired the defendant served a notice of motion to strike out certain irrelevant allegations of the complaint and to compel plaintiff to separately state and number the counts of the complaint. Before time to answer had expired, plaintiff served an amended complaint, complying with the requirements of defendant's motion, which defendant refused to receive unless costs of motion were paid, which plaintiff declined to pay:

Held, that, under section 542 of the Code of Procedure, plaintiff

should not be required to pay costs of motion. (*Welch agt. Preston et al., ante, 52.*)

3. The words "without prejudice to the proceedings already had" were not designed to compel a party who had committed an error in his pleadings to pay costs of one amendment, and thereby nullify the right which had been secured to him by the statute, of "once amending his pleading, of course, without costs." (*Id.*)

4. In an action brought by a creditor of a manufacturing corporation against a trustee for a liability imposed by the fifteenth section of the act of 1848 for the filing of a false report, the complaint should show that the debt, for which the defendant is sought to be made liable, was contracted while he was a trustee. (*Anderson agt. Speers, ante, 68.*)

5. Where the complaint alleged that the defendant was, on the 13th day of January, 1877, and "before that date," a trustee:

Held, not to be an averment that he was such trustee, in the year 1876, when the debt was alleged to be contracted. (*Id.*)

6. The filing of a false report on successive years gives rise to a separate cause of action as to each year. (*Id.*)

7. The allegations in one cause of action cannot be supplemented by those in another and separate cause in the same complaint, unless they are connected therewith by appropriate statements. (*Id.*)

8. *Victory Webb, &c., Company agt. Beecher* (55 *How. P. R.*, 193) applied. (*Id.*)

9. Several causes of action, all arising upon contract, may be joined. (*De Witt agt. McDonald, ante, 411.*)

10. That the second and third causes

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of action contained sufficient allegations to show breaches of the contracts therein disclosed is sufficient. (*Id.*)

11. The words "fraudulently represented," or "with intent to deceive," or other words charging a wrongful intent are necessary to allege a tort. (*Id.*)

12. Where the complaint merely avers "her agent B. then represented to plaintiff;" and, "defendant entered into an agreement with plaintiff" it does not allege a tort. (*Id.*)

13. The tort may be waived and the defendant may be sued upon contract:

Held, that the tort in this case appears to have been waived.

Held, further, that there was no defect of parties defendant, as B. is averred to have been the defendant's agent. (*Id.*)

14. As applied to one in a professional character, the language that is claimed to be actionable, *per se*, must "touch him" in that profession. (*Gunning* agt. *Appleton*, ante, 471.)

15. Where the complaint alleged that plaintiff, for nearly forty years past, has been, and still is, a practicing dental surgeon, and was of good name, fame and credit in such profession; that the defendants maliciously published, concerning plaintiff, in their said journal, a certain article, containing many detractive misstatements and especially the false and defamatory matter following, to wit: "The late William H. Seward, when traveling around the world, and when at Tokohama, Japan, required the services of a dentist. Upon examination, it was found that the inferior maxilla was comparatively useless for masticating purposes, there being a false joint at the seat of the original fracture, no union having

taken place. This case will be remembered, from the world-wide notoriety of the circumstances attending the injury, as well as the reports, which have been universally believed, that the patient was benefited by the treatment he received for the cure of his fracture."

Held, That the language is not defamatory on its face. It assumes to give an account of a circumstance in which many others besides plaintiff may be presumed to have had an interest. He is not therein referred to personally, or as one of a class. It is not alleged that no subsequent cure was effected, or that he was under treatment prior to the examination mentioned.

Held, also, that the allegations in the complaint, following the statement of the publication claimed to be libelous, can only be regarded as innuendoes to explain, not to extend the meaning of such publication.

Held, further, that no malice is presumable from the publication in question, and no right of action has accrued to plaintiff therefrom. (*Id.*)

16. To impute to a professional man ignorance, or want of skill, in a particular transaction, is not actionable. To be actionable, words of that character must be spoken or written of him generally. (*Id.*)

17. In an action for libel, the defendants have a right to test the actionable quality of the words by demurrer, and to that extent only is their pleading to be construed as an admission of the allegations of the complaint. (*Id.*)

See JOINDER.

McDonald agt. *Kountee*, ante, 152.

18. A written complaint made before a magistrate alleged that certain goods had been stolen, and that the complainant "has probable cause to suspect, and does sus-

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pect, that Frederick Blodgett" stole them:

Held, that it was insufficient to justify the magistrate in issuing a warrant for the arrest of the accused. (*Blodgett agt. Race*, 18 *Hun*, 132.)

COMPULSORY REFERENCE.

1. Where upon appeal to the general term from a judgment entered upon the report of a referee, appointed under the provisions of the Revised Statutes to determine as to the validity of a claim against the estate of a deceased person, disputed by his administrator, the judgment is set aside and the order of reference vacated, the court at special term has power to refer the case to a new referee to hear and determine, even though the action be one in which a compulsory reference cannot ordinarily be ordered. (*Masten agt. Budington*, 18 *Hun*, 105.)

CONFESSION.

1. Where in a confession of judgment the defendant states that the indebtedness "is for a debt justly due from me to said plaintiff for moneys to that amount loaned and advanced to me by said plaintiff," it is sufficient as between the parties and is only voidable, if at all, in a direct action or motion to vacate it by a junior judgment creditor or *bona fide* purchaser. (*Torrett agt. Brooklyn Improvement Co.*, 18 *Hun*, 6.)

CONFLICT OF LAWS.

1. A contract is to be governed by the laws of the place where it is made, if it is not, by its terms, to be performed elsewhere; but if, by its terms, it is to be performed in a state other than that in which

it is made, the law of the state in which it is to be performed must govern (*Affirming S. C.*, 13 *Hun*, 405; see *S. C.*, 53 *How.*, 40). (*Dickinson agt. Edwards*, *ante*, 24.)

2. This is the general rule of construction. The exceptions to it stated. (*Id.*)
3. The case of *Jewell agt. Wright* (30 *N. Y.*, 259) approved, and the cases of *Bowen agt. Bradley* (9 *Abb. Pr.* [*N. S.*], 395) and *Wayne County Savings Bank agt. Low* (6 *Abb. N. C.*, 76), disapproved. (*Id.*)

CONSOLIDATION OF ACTIONS.

1. Where three actions of foreclosure had been commenced, the defendants being the same in each, the mortgage in the first action covering fifty acres of land which, after the execution of this mortgage and the two mortgages affected by the second action, had been sold to L. D., one of the defendants; the two mortgages in the second action covered 150 acres, embracing the lands affected by the mortgage in the first action; the mortgage in the third action covered 100 acres, being part of the land affected by the mortgages in the first and second action, and excluding the portion sold to the defendant L. D.; on motion to consolidate the three actions:

Held, that the motion could not be granted for the following reasons:

First. The authorities are against it (6 *Abbott's New Cases*, 69).

Second. The proceedings are, *in rem*. against different pieces of property, and there is no reason why one parcel should bear burdens in the way of costs which belong to another.

Third. Rights of individual defendants differ, and one defendant should not bear that which belongs to another. (*Kipp agt. Delamater et al.*, *ante*, 183.)

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CONSTRUCTION.

See WILL.

Brown agt. Cleveland, ante, 298.

CONTEMPT.

1. Before a party can be punished for alleged contempt, in violating an injunction order, there must be proof tending to establish his connection with the act complained of. Suspicious circumstances merely may, if unexplained, be in some cases sufficient, but are insufficient when they are met by positive and explicit testimony explaining them, and fully clearing the party from all complicity with the persons doing the act, and from prior knowledge of intent to commit it. (*Salter agt. Merritt, 75 N. Y., 268.*)
2. Where an attorney has two clients, one of whom is enjoined, and the other who is in an independent position, having or claiming different rights or interests, is not enjoined, such attorney cannot ordinarily be charged with violation of the injunction in advising or acting professionally for the client not enjoined; his being enjoined as attorney for one client does not limit or restrain his professional action for others. (*Id.*)
3. The willful refusal of a receiver to obey an order of the court, requiring a payment by him out of funds in his hands as receiver, is a disobedience by a person "appointed to perform, * * * ministerial services" of a lawful order of the court, and a misdemeanor in his office, and willful neglect of duty therein within the meaning of section one of that portion of the Revised Statutes relating to "proceedings as for contempt" (2 *R. S.*, 534, sec. 1, sub. 1); it does not come within the fourth section (2 *R. S.*, 535, sec. 4) authorizing the issuing of a precept without notice to commit a person disobeying an order "made

for the payment of costs or any other sum of money." (*Clark agt. Bining, 75 N. Y., 344.*)

4. It is therefore proper practice in such case for the court to grant an order for the receiver to show cause "why he should not be punished for the alleged misconduct" (2 *R. S.*, 535, sec. 5). (*Id.*)
5. The receiver must have an opportunity to be heard, and there must be an adjudication that he was guilty of the misconduct, before he can be punished. (*Id.*)
6. Where, in proceedings upon an order to show cause the receiver is adjudged guilty of the alleged misconduct, this court cannot upon appeal therefrom review the order directing the payment; the supreme court has power to direct its receiver as to the disposition of funds in his hands, and its order to that effect, if not appealed from, must be obeyed whether correct or not; the propriety of the exercise of the power cannot be considered on such an appeal. (*Id.*)
7. Where it appears that a receiver has funds in his hands sufficient to satisfy a lien thereon and willfully refuses on demand to obey an order of the court directing him to pay such lien, it is a justifiable inference that such conduct impedes, impairs and defeats the rights and remedies of the lienor to the extent of the lien; and upon an adjudication to that effect a fine may be imposed upon the receiver to the amount of the lien (2 *R. S.*, 538, secs. 20, 21); and the power of the court is not limited to a fine of \$250, with "costs and expenses" (sec. 22). (*Id.*)
8. It is not necessary that the order imposing the fine should in form adjudge that actual loss or injury has been sustained to the amount of the fine; it is sufficient if it appears that such loss has been suffered. (*Id.*)

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9. Nor is it essential to show that the loss or injury is irremediable and hopeless. (*Id.*)

10. After the granting of an order fining B., a receiver, the amount of a lien upon the fund in his hands, because of willful disobedience of an order requiring him to pay such lien, and directing his imprisonment until he paid it, an order was granted forbidding K., the receiver of a savings bank, in which bank B. had deposited a portion of the fund, from paying over to B. any part of said fund so deposited by him, and directing K. to pay all dividends thereon to T. the lienor:

Held, that the order should be modified by inserting a clause that all moneys paid by K. to T. should be applied in reduction of the fine imposed upon B., and that B. upon showing any sum in the hands of K. as such receiver belonging to the fund and payable to B. may have that sum applied to the reduction of his fine. (*Id.*)

11. An order refusing to punish an alleged contempt in disobeying an injunction is not appealable to this court. (*Simmonds* agt. *Simmons*, 75 N. Y., 612.)

12. On appeal from an order adjudging the appellant guilty of contempt in not obeying a peremptory writ of *mandamus*, the question as to the propriety of the order granting the writ is not presented and cannot be considered. (*Peo. ex rel. Garbutt* agt. *Rock* and *S. L. R. R. Co.*, 76 N. Y., 294.)

13. It seems, that the penalty prescribed by the Revised Statutes (2 R. S., 587, sec. 60), when a peremptory *mandamus* shall be directed to any public officer, body or board, requiring them to perform a public duty, where it shall appear that such officer, or any member of the body or board has, without just excuse, refused to perform the duty, was intended

as a punishment for an unexcused neglect of duty before the issuing of the writ, and which rendered the application therefor necessary; it does not fix and limit the fine which may be imposed for a violation of the writ. (*Id.*)

14. The provision of the Revised Statutes, in relation to contempts (2 R. S., 534, sec. 1, sub. 3), which provides for the punishment as for a contempt of "disobedience to any lawful order, decree or process of a court of record," embraces disobedience of a peremptory *mandamus*; the writ is to be regarded as an order of the court, within the meaning of the statute. (*Id.*)

15. In imposing a fine for such a disobedience, the court may include as an expense a fair compensation to the relator's attorney for his services in the proceedings. (*Id.*)

CONTRACT.

1. A contract is to be governed by the laws of the place where it is made, if it is not, by its terms, to be performed elsewhere; but if, by its terms, it is to be performed in a state other than that in which it is made, the law of the state in which it is to be performed must govern (*Affirming S. C.*, 13 Hun, 405; see *S. C.*, 53 How., 40). (*Dickinson* agt. *Edwards*, ante, 24.)

2. This is the general rule of construction. The exceptions to it stated. (*Id.*)

3. The case of *Jewell* agt. *Wright* (30 N. Y., 259) approved, and the cases of *Bowen* agt. *Bradley* (9 Abb. Pr. [N. S.], 395) and *Wayne County Savings Bank* agt. *Low* (6 Abb. N. C., 16), disapproved. (*Id.*)

4. Where a contract was made between one G. and the city of New York for regulating, &c., Eleventh avenue, and there was inserted

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in the contract a provision that the contractor should satisfy all liens for work or materials, filed with the commissioner of public works before or within ten days after the completion of the work, otherwise the city should be entitled to retain from any money due the said contractor a sufficient amount to satisfy such claims until the liabilities aforesaid shall be fully discharged, or such notice withdrawn; the plaintiff claims all the funds by *assignment of moneys due and to grow due*; the defendants R. and B. claim portions by equitable assignments or orders, other defendants claim by liens under the contract:

Held, that those lienors who filed their claims in accordance with the terms of the contract are entitled to be paid in the order in which the claims were filed, and the plaintiffs and such defendants as claim by assignment are not entitled to any interest in the funds in the hands of the city until such liens are satisfied. (*Mechanics and Traders' National Bank* agt. *The Mayor*, ante, 207.)

5. The plaintiff, as the assignee of G., took the contract subject to all the equities existing between him and parties doing work and furnishing materials under the contract, or which, under the terms of the contract, lienors might enforce against him. (*Id.*)

See NEW YORK (CITY OF).

Kelly agt. *Devlin*, ante, 487.

CORPORATION.

See REMOVAL OF CAUSE.

Union Pacific Railroad Company agt. *McComb*, ante, 478.

COSTS.

1. Where the claim was presented to the executors for \$1,151.50, which the executors rejected and

offered to refer, and under a stipulation of the parties the same was referred, the plaintiff recovering only \$874, there being no proof of bad faith or mismanagement on the part of the executors:

Held, that plaintiff was not entitled to recover costs against the executors, and that her rights were limited to the referee's and witness fees, and other necessary disbursements, to be taxed according to law. (*Pursell* agt. *Fry*, ante, 817.)

2. A non-resident need not furnish security for costs if he begins suit in a justice court or municipal court, although such security could be compelled if suit was commenced in courts of record, but not when an appeal is taken to the county court. (*Mellen* agt. *Hutchins*, ante, 849.)

3. In an action against two defendants to set aside a sale made by one to the other on the ground of inadequacy of consideration, and that there was fraud in the sale, where the defendants appeared by separate attorneys and were successful, they are each entitled to tax separate bills of costs. (*Milligan* agt. *Robinson and Roof*, ante, 380.)

4. Proceedings under chapter 804, Laws 1868, for the recovery of surplus moneys arising upon mortgage foreclosures by advertisement are special statutory proceedings. (*Matter of Gibbs*, ante, 502.)

5. Successful claimants may, in the discretion of the court, be allowed costs under chapter 270, Laws 1854, at the rate allowed for similar services in civil actions. (*Id.*)

6. Proceedings for the recovery of surplus moneys arising upon foreclosures by action are proceedings in the action, and are similar to proceedings under chapter 804, Laws 1868. When costs are al-

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lowed, they must be at the rate allowed in proceedings for the recovery of surplus moneys arising upon foreclosures by action, i. e., necessary disbursements and motion costs. (*Id.*)

7. In an action for the construction of a will, the costs are in the discretion of the court. (*Leonard et al. agt. Davenport, ante, 384.*)

8. The reversal, upon appeal by the common pleas general term, of a judgment rendered against a defendant by a district court of the city of New York for an amount of damages exceeding fifty dollars, entitles such defendant to ten dollars extra costs as part of the costs of the district court. (*Boyd agt. Disbrow, ante, 399.*)

9. *Ellert agt. Kelly* (4 E. D. Smith 12) explained. (*Id.*)

10. It seems that the statute permitting a plaintiff to prosecute as a poor person is not intended to apply to non-residents, but was solely for the benefit of residents of the state. (*Christian agt. Gouge and another, ante, 445.*)

See PRACTICE.

Board of Supervisors agt. Bristol, ante, 3.

See COMPLAINT.

Welch agt. Preston et al., ante, 53.

See REFEREE.

Fischer agt. Raab et al., ante, 231.

11. On an appeal taken under subdivision 2 of section 349 of the Code, from an order overruling a demurrer, the successful party is entitled to tax as costs, under subdivision 5 of section 307 of the Code, twenty dollars before and forty dollars for argument. (*Wright agt. Flemming, 18 Hun, 360.*)

12. October 24, 1878, the plaintiff presented to the defendants a claim

for services rendered in attending upon their testator (the plaintiff's father) and his wife, amounting to \$1,531.50, claiming wages at the rate of three dollars per week. On December 9, 1878, the defendants rejected the claim and consented to a reference, upon which the plaintiff recovered \$674, the referee fixing the wages at two dollars per week. The referee also found that the defendant acted with prudence and in good faith in resisting the payment of the plaintiff's claim:

Held, that an order awarding costs to the plaintiff was erroneous and should be reversed. (*Purcell agt. Fry, 19 Hun, 595.*)

13. After an action had been tried, and a verdict rendered for the plaintiff, and before entry of judgment, it was discovered that the judge was disqualified, being one of the executors of an estate holding stock in the defendant corporation. The action was retried before another judge, and the plaintiff again recovered a verdict:

Held, that the plaintiff was entitled to tax costs for two trials. (*Oregin agt. Brooklyn Croastown R. R. Co., 19 Hun, 349.*)

14. Where a defendant, in an action in a justice's court, procures a discontinuance thereof upon the ground that the accounts of the parties at issue exceed \$400, and plaintiff thereupon brings an action in the supreme court and recovers less than fifty dollars, defendant is estopped from claiming that the justice had jurisdiction, and so that he is entitled to costs; the plaintiff has a right to repose upon the decision of the justice, and it is not open for defendant, in answer to plaintiff's claim for costs, to say that such decision was erroneous; having availed himself of it he cannot question it. (*Bradner agt. Howard, 75 N. Y., 417.*)

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15. An assignment of a cause of action, made simply as collateral to an indebtedness of the assignor to the assignee, is not such a transfer as makes the assignee liable for costs under the provision of the Code (*old Code, sec. 821*), declaring that when, after the commencement of an action, the cause of action by assignment or otherwise becomes the property of a person not a party to the action, such person shall be liable for costs; it is not a transfer of the absolute property within the meaning of said provision. (*Peck agt. Yorks, 75 N. Y., 421.*)

16. Where there has been a series of orders connected with the same matter so that if one is erroneous all are, upon appeal from one the general term is authorized to reverse the whole, so as to leave the records of the court clear and consistent. The general term, however, in such case, can only grant costs of one motion, and on appeal from one order. (*Stanton agt. King, 76 N. Y., 585.*)

17. Where, in an equity action, there are two defendants, not joined in interest, who appear by separate attorneys, put in separate answers, and both succeed, it is in the discretion of the court to allow costs to each defendant. (*Hauselt agt. Valmar, 76 N. Y., 680.*)

18. In proceedings by *certiorari* to review assessment made by board of commissioners of taxes and assessments for city and county of New York, when board is successful cost properly allowed. (*See People ex rel. agt. M. F. Ins. Co., 76 N. Y., 64.*)

COUNTY JUDGE.

1. A county judge, elected in 1878, filed a certificate with the secretary of state, stating that he was then sixty-five years old, and that his official term would expire on

the last day of December, 1878, by reason of the disability of age prescribed by the constitution:

Held, that a county judge was properly elected at the general election held in November, 1878, and that there was on January 1, 1879, no vacancy in that office which could be filled by the governor. (*People ex rel. Joyce agt. Brundage, 18 Hun, 291.*)

2. When a special proceeding is pending before a county court, the county judge whereof is disqualified from acting, he cannot make an order directing it to be continued before a justice of the supreme court, but should make and file with the county clerk a certificate of the fact of his disqualification.

A proceeding pending in the county court cannot be continued before a justice of the supreme court, but must be removed into the supreme court. (*Matter of Village of Rhinebeck, 19 Hun, 346.*)

COUNTY TREASURER.

See WITNESS.

Matter of Proceedings against Dickinson, ante, 260.

COVENANT.

See GRANTOR AND GRANTEE.

Fleischauer agt. Doellner, ante, 190.

See ASSIGNMENT.

Boyd agt. Belmont, ante, 513.

See PLEADING.

Woolley agt. Newcombe, ante, 480.

CREDITOR'S BILL.

1. This action was brought by the plaintiff against the defendant, individually, and as executrix of J. A. Mead, deceased, upon an indebtedness of the deceased, con-

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sisting of two notes and a judgment, amounting in all to \$1,500. The complaint alleged the appointment of the defendant as executrix July 2, 1877, and that she was sole legatee; that the only assets of the estate were about \$500 worth of personal property, and land in Wisconsin, worth about \$1,500; that shortly before his death the testator had assigned, without consideration, a policy of insurance upon his life to the defendant, who had collected it; that defendant had filed no inventory of his estate and was about to leave the state and take the assets of the estate with her:

Held, that the action could not be sustained as a creditor's bill, as the plaintiff had not exhausted its remedy at law. (*Genesee River Nat. Bank agt. Mead*, 18 Hun, 803.)

2. That, upon the facts stated in the complaint, the defendant could not be arrested under subdivision 4 of section 550 of the Code of Civil Procedure (the substitute for a writ of *ne exeat*). (*Id.*)

3. That the complaint did not state facts sufficient to constitute a cause of action, and that the plaintiff might move at any time after service of the complaint to vacate an order of arrest granted in the action upon affidavits containing the same allegations as the complaint.

That such motion might be made more than twenty days after the order of arrest was served. (*Id.*)

4. A simple contract creditor cannot maintain an action to set aside as fraudulent a conveyance made by his debtor; nor will such an action lie by a judgment creditor where more than ten years have elapsed since the docketing of the judgment, and no new lien upon the land has been acquired by the levy of an execution thereon. (*Evans agt. Hill*, 18 Hun, 464.)

5. *Quare*, as to the power to sell land under an execution, issued upon a judgment after the lapse of ten years from the time of its docket. (*Id.*)

CRIMINAL LAW.

1. If a jury are convinced of the intentional falsity of evidence and such willful perjury, committed for the purpose of deceiving and misleading them, has destroyed their confidence in the truthfulness of the man and of his whole story, it is their legal duty then to reject his entire testimony as proving nothing. (*The People agt. Moett*, ante, 487.)

2. Where, on a trial for murder, the prisoner had been a witness in his own behalf and was the only person who gave direct evidence of the incidents of the transaction from having witnessed them, and the judge in charging the jury in regard to the evidence of the prisoner, among other things said: "And there is another thing in law which is just as clear and that is, when a party in a civil action *deliberately* swears false to one material part of his testimony, and the jury are satisfied that he has so sworn falsely, *intentionally false*, they are not only at liberty to reject it, but it *sometimes* is the duty of the jury to reject the whole. The maxim is *falsus in uno, falsus in omnibus*." To this portion of the charge there was an exception:

Held, that this exception did not present a plausible ground of error. Where a witness commits perjury in a part of his evidence the whole should be rejected, because the corrupt motive and purpose *then* manifested must destroy all faith in the man. (*Id.*)

3. When any doubt exists as to whether the witness has committed perjury in giving the evidence which is to be considered, it must be for the jury to decide whether,

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in the testimony to be weighed, perjury has been committed. But if that point, the actual commission of perjury in the cause on trial, is passed by an affirmative answer, *it seems* there could be no error in instructing the jury that a witness who has been confessedly corrupt and perjured, not upon some previous trial but during the progress of the one in which his evidence has been given to them, is entitled to no credit whatever. (*Id.*)

4. When an exception is taken to the enunciation of a legal proposition by the court, such exception only presents the legal soundness or unsoundness of the utterance. If the charge, as made, is legally correct and counsel suppose that it requires some explanation to prevent the jury from being misled a specific request for that purpose should be made. (*Id.*)

CRIMINAL TRIAL.

1. During the trial of a prisoner on an indictment for libel, the court has power, at his request, to withdraw a juror, and allow the case to go over the term. (*McFall* agt. *People*, 18 *Hun*, 382.)

CROSS-EXAMINATION.

1. On cross-examination, leading questions tending to elicit new matter are not allowed as a matter of right. (*People* agt. *Genet*, 19 *Hun*, 91.)
2. As to the proper limits of a cross-examination of the accused offering himself as a witness in his own behalf. (*Id.*)
3. One of the prisoner's witnesses was asked, on cross-examination, if he had been indicted for assault and battery. An objection there-

to was made by the prisoner's counsel and overruled by the court:

Held, no error. Prisoner may be asked, on cross-examination, whether he made any effort to keep out of the way of the sheriff, as attempts to escape or avoid arrest are some evidence of a guilty conscience. (*Ryan* agt. *People*, 19 *Hun*, 188.)

4. Where a witness adds to his answer an expression of his opinion, not responsive to the question, it may be properly stricken out on the motion of the party putting it. (*Id.*)

DAMAGES.

1. Where a husband enters into a contract for the sale of land held by him and his wife jointly, and is unable to fulfill the same by reason of the refusal of his wife to join in the deed, the vendee may recover, as damages, the difference between the price named in the contract and the actual value of the land at the time of the breach of the contract. (*Timby* agt. *Kinsey*, 18 *Hun*, 255.)
2. This court has no jurisdiction to reverse a judgment in an action for negligence because of excessiveness of damages. (*Gale* agt. *N. Y. C. and H. R. R. Co.*, 76 *N. Y.*, 594.)
3. An order of reference to ascertain the damages sustained by defendant, by reason of an injunction, recoverable upon an undertaking given under the Code of Procedure (*old Code*, sec. 222), cannot be granted until it has been determined by judgment or other decision of the court that plaintiff was not entitled to the injunction; it is not sufficient that this appears by the facts developed upon the trial. (*Benedict* agt. *Benedict*, 76 *N. Y.*, 600.)

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DEBTOR AND CREDITOR.

1. Where a judgment creditor seeks by motion to set aside a prior judgment on the ground of fraud, it is within the discretion of the supreme court, whether to determine the matter on motion, or to require the creditor to bring an action; and from its determination no appeal lies to this court. (*Beards agt. Wheeler*, 76 N. Y., 213.)
2. *It seems*, that an action is the more appropriate method. (*Id.*)
3. *It seems*, also, that where a debtor, against whom actions have been commenced by different creditors, serves an offer of compromise under the Code (*old Code*, sec. 885; *new Code*, sec. 788) in the action last commenced, and thus enables the plaintiff therein, by accepting the same, to perfect his judgment in advance of the creditor who first brought suit, and to obtain a preference in the payment of his debt, this is not such a fraud as will authorize the setting aside of the judgment so obtained; the giving of a preference to one creditor over another is not unlawful. (*Id.*)
4. The taking, by a creditor, of the debtor's note for an existing indebtedness does not merge or extinguish the indebtedness; the note is simply evidence of the debt, and its operation is only to extend the time of payment. (*Jagger Iron Co. agt. Walker*, 76 N. Y., 521.)
5. When default is made in payment, the creditor may sue upon the original demand and bring the note into court to be delivered up on trial. (*Id.*)
6. And so, successive renewal notes are simply extensions from date to date of the time of payment. (*Id.*)
7. This rule is not changed by the facts that the first of a series of notes so given was indorsed and procured to be discounted by the creditor, and the succeeding ones were each discounted to raise money to take up the preceding one. No note in the series is a payment of the preceding one, unless there has been a discharge of the creditor as indorser, or unless by the transaction he has obtained a claim against another party. (*Id.*)

DEFENSE.

1. An entirely new defense cannot be interposed at the trial by way of amendment, and a refusal by the trial justice to permit the tenant to amend upon the trial, by pleading the foreign statute, was not error. (*Graves agt. Cameron*, ante, 76.)
2. An allegation in an answer "that the contract set forth in said complaint is inoperative and void for want of a sufficient and adequate consideration therefor," is an allegation of a conclusion of law. It is necessary to aver the facts which would show that there was no sufficient and adequate consideration. (*Hammond agt. Earle and another*, ante, 426.)
3. Each answer must, of itself, be a complete answer to the whole complaint, as perfectly so as if it stood alone. Unless, in terms, it adopts or refers to the matter contained in some other answer, it must be tested as a pleading alone by the matter itself contains. If it is not complete, in and of itself, it is insufficient in law and cannot be sustained by reference to the other defenses contained in the answer. (*Id.*)
4. A defense that the plaintiff is not the real party in interest, is not available unless supported by facts

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pleaded like any other defense. (*Id.*)

5. The defense of recoupment is available, if facts support it, whether pleaded for that purpose or otherwise. If the allegations in respect to that defense are not sufficiently definite and certain to enable the plaintiff to understand them, or to raise a clear and precise issue, the remedy by the plaintiff is by motion to make more definite and certain. (*Id.*)
6. Where the facts alleged in the answer are sufficient to entitle the defendant to a recoupment of his damages, even if they are obscurely or vaguely set forth, the answer is not, for that reason, demurrable. (*Id.*)

DEFINITIONS.

1. The word "judgment," as used in the provision of the Code of Procedure (*sec. 34*), conferring appellate jurisdiction upon the court of common pleas, was used in its usual sense, and does not include determinations not resulting in judgments. (*Bamberg agt. Stern, 76 N. Y., 555.*)
2. The word "labor" in mechanics' lien law of 1862 (*chap. 478, Laws of 1862*), includes the work of an architect employed to superintend erection of building; it includes skilled as well as unskilled labor. (*See Stryker agt. Cassidy, 76 N. Y., 50.*)
3. "Street" includes sidewalks and gutters, and "paving" includes flagging of sidewalks. (*See In re Burmeister, 76 N. Y., 174.*)

DEMURRER.

1. In an action for libel the defendants have a right to test the actionable quality of the words by

demurrer, and to that extent only is their pleading to be construed as an admission of the allegations of the complaint. (*Gunning agt. Appleton, ante, 472.*)

2. A decision of the court, sustaining or overruling a demurrer, is an order, not an interlocutory judgment; and, as in the provision of the Code of Civil Procedure (*new Code, sec. 1849*), specifying appealable orders, this is not enumerated, an appeal to the general term from such a decision does not lie. It can only be reviewed on appeal from a final judgment entered thereon. (*Cam. Val. Nat. Bk. agt. Lynch, 76 N. Y., 514.*)

DISCONTINUANCE

1. It is in the discretion of the court whether to grant or refuse an application for leave to discontinue an action on payment of costs. (*Carleton agt. Darcy, 75 N. Y., 375.*)
2. There is no valid discontinuance without an order of the court; and while, as a general rule, plaintiff may, on payment of costs, enter an order of discontinuance, give notice thereof, and the cause is thereby discontinued, yet the court has the right to control the order; and where circumstances exist making a discontinuance without terms inequitable, the court may refuse it altogether or except on terms, and may open an order entered *ex parte*. (*Id.*)
3. Plaintiff recovered judgment in an action of ejectment, and was put in possession of the premises; defendant paid the costs and took a new trial under the statute, thereupon plaintiff, still retaining possession, moved for leave to discontinue on payment of costs: *Held*, that in denying the motion the court below did not exceed its discretion. (*Id.*)

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DIVORCE.

1. In an action brought by the wife against the husband for adultery where the defendant appeared and denied the adultery, and on the plaintiff's motion the defendant was ordered to pay a certain sum towards the expenses of the action, and upon demand being made the defendant neglected and refused *in toto* to comply with the order, upon proof of these facts the plaintiff moves for an order "striking out the defendant's answer and for an order of reference as in case of default."

Held, that the motion should be denied. The only power possessed by the court to strike out a pleading, or to change and alter the same in any particular on a motion like this, is contained in sections 538, 545 and 546 of the Code of Civil Procedure; and this is not a case within either of those sections. (*McCrea* agt. *McCrea*, *ante*, 220.)

2. So long as there is an issue framed by the pleadings, in an action for a divorce, there can be no reference. (*Id.*)
3. To entitle a wife to a divorce *a mensa et thoro*, under the first and second subdivisions of the statute (2 R. S., 147, sec. 51), there must either be actual violence or a reasonable apprehension of bodily injury. (*Ruckman* agt. *Ruckman*, *ante*, 278.)
4. Wounded susceptibilities will not suffice; occasional outbursts of passion will not do; nor mere abuse, however gross. (*Id.*)
5. Words of menace, however, are sufficient, if they be of such a character, and accompanied by such circumstances, as to justify a belief in their seriousness. That is, they must impress the person to whom they are addressed, not as idle words, not as a form of intemperate expression, but as im-

porting action, and in that sense conveying the reality of a threat of bodily harm. (*Id.*)

6. Jeopardy to health also comes within the rule. (*Id.*)

7. Although words in form threatening were uttered, yet where, upon a patient and thoughtful review of the entire evidence, the court are satisfied that the language used was a mere exhibition of coarse and vulgar passion, that the defendant never for a moment contemplated physical violence, and that the plaintiff never believed herself to be in the slightest jeopardy:

Held, that the action should be dismissed. (*Id.*)

8. To justify a judgment for limited divorce on the ground of abandonment, such circumstances must appear as manifest *a settled and determined purpose in the husband to withdraw from the wife permanently his society and protection, and to withhold from her the means necessary for her support.* (*Id.*)

9. A decree for maintenance is but an incident to one for a separation, and the circumstances under which such a decree (*i. e.*, for maintenance) may be made, must be of such a nature as would in themselves justify a direction of a separation. (*Id.*)

10. Under the provisions of Rule 78, a defendant in an action for divorce cannot be permitted to testify in her own behalf, to contradict the plaintiff, in respect to the matters as to which that rule allows the plaintiff to testify. (*Hennessey* agt. *Hennessey*, *ante*, 304.)

11. Although the amendment made to section 831 of the Code of Civil Procedure, in 1879, is very broad, *it seems* such amendment has not removed the restriction heretofore

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imposed by statute, as to parties to an action for a divorce testifying in their own behalf. (*Id.*)

12. Can a decree of divorce be attacked collaterally by a party to such decree as against a third person? *Quære.* (*Jordan agt. Van Epps, ante, 338.*)

See JAIL LIBERTIES.

Allen agt. Allen, ante, 381.

13. Where an action for divorce is commenced by the service upon the defendant of a summons alone, and he neglects to appear therein, the judgment may award final alimony, if demanded in the complaint, without any notice being given to him of the application to be made therefor. (*Park agt. Park, 18 Hun, 466.*)

14. The right of the wife to final alimony, and the ability of the husband to furnish it, are to be determined by the situation and condition of the parties at the time of the entry of final judgment, and is not to be modified by any subsequent change in the situation of either party. (*Id.*)

15. After an absolute divorce procured by a wife, she may release her dower rights to her husband. (*See Savage agt. Crill, 19 Hun, 4.*)

DOWER.

1. An inchoate right of dower can be determined and cut off by partition suit. (*Jordan agt. Van Epps, ante, 338.*)
2. A woman whose dower has not been admeasured may be made a party defendant in a partition suit; and if she be made a party to such suit, under an allegation that she is entitled, or claims to be entitled, to dower, the decree is conclusive as to her homestead right. (*Id.*)

DRIVEN WELLS.

1. Where the petition for a reissue of a patent sets forth that by reason of an insufficient or defective specification the original patent is inoperative or invalid, and that such error arose from inadvertence, accident or mistake, and without any fraudulent or deceptive intention:

Held, that this is a ground of reissue set forth in section 53 of the act of July 8, 1870 (16 U. S. Stat. at Large, 205), and the decision as to the fact set forth belongs exclusively to the commissioners of patents, and his action conclusively establishes that fact. (*Christman agt. Rumsey, ante, 114.*)

2. Where it was urged that the original specification stated the invention to be "a new and improved pump filter," while the reissue specification states the invention to be "an improvement in pump filters;" it being also contended that the original claims the whole and nothing else, while the reissue makes two claims, neither of which claims the whole or includes the collar or head-piece "B," and that the first two sentences above cited in the reissued specification are new matter in violation of section 53 of the act of 1870:

Held, that these two sentences cannot properly be called "new matter" within the meaning of the statute. They do not at all relate to the description or operation of the apparatus of the patentee.

Held, further, that the difficulties stated to have existed in prior pointed pump tubes may well have been known to the patentee from hearsay, although the first driven well point he may have seen was his own. As the patentee's pump tube is a pointed pump tube, and as it does overcome such difficulties in clogging in such a tube, the presumption is that it was

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made to overcome such difficulties, and, therefore, that such difficulties had been heard of by the patentee. (*Id.*)

3. It is further urged that the original specification describes the invention as applicable to all pump filters, whether used upon points for driven wells or upon well tubes used in open wells or cisterns or streams, while the reissued specification introduces new matter by confining the invention to driven wells only. It is contended that in this there is a violation not only of the provisions of section 53 of the act of 1870 in regard to new matter, but a violation of the provision of that section, that in case of a machine patent neither the model nor the drawings shall be amended, except each by the other:

Held, that as the same idea is found in the original specification and drawing, taken together, there is no new matter in the reissued specification or in the reissued drawing. (*Id.*)

4. Where the claim of the original patent was this: A pump filter composed of the parts A, B and C, substantially as and for the purposes described, it is urged that such claim included the three distinct parts, A, B and C, in combination, embracing the whole of the structure described; that there is no suggestion in the original specification that the patentee had invented any combination or parts less than the whole, and that each of the claims of the reissue is for a combination of parts less than the whole, and is, therefore, void:

Held, that, under the decision in the *Corn Planter Patent* (23 Wall-ace, 181), the reissue in the present case cannot be held to be void. The drawings of the original and the reissue being the same, and the two specifications describing the same mechanical structure, with the same mode of operation, it must be held to be lawful to reissue the patent with claims to

combinations of fewer elements than were contained in the combination claimed in the claim of the original patent. The original claimed a general and larger combination, and the reissue claims sub-combinations which enter into such general and larger combinations. Such a reissue is sustainable on the ground that the reissue was for things contained within the apparatus described in the original patent.

Held, further, that it is of no importance that the wire gauze "C," may not, by itself, have been new; or that the open grating or ground "A," may not, by itself, have been new; or that any other ingredient of the combination claimed in the reissue may not, by itself, have been new so long as the combinations, as claimed, were new. (*Id.*)

5. That the two claims of the reissue do not claim combinations, but claim merely aggregations of parts, is not regarded as a tenable objection. The object of the combination claimed in the first claim is to enable the structure to be driven into the earth, and these serve for a pump and a filter without being injured in driving. Nothing less than a combination of all the elements in such combination will accomplish all the objects which such combination will accomplish. So, too, the grating and the wire gauze of the second claim act in combination in controlling the passage of the water from the outside of the grating to the interior of the wire gauze.

Held, also, that although the second claim is invalid for want of novelty, the plaintiff can recover on the first claim under section 60 of the act of July 8, 1870 (16 U. S. Stat. at Large, 207; now section 4922 of the Revised Statutes), although no disclaimer has been made as yet to the second claim, provided that, prior to the entry herein as to such first claim, they

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make a disclaimer under section 4917 of the Revised Statutes, as to the second claim, it not appearing that there has been heretofore any unreasonable neglect or delay to enter such disclaimer; but as such disclaimer was not entered before the commencement of this suit, the plaintiffs will not be entitled to recover any costs of this suit. (*Id.*)

EASEMENT.

See RIGHT OF WAY.

Outerbridge and Scott agt. *Phelps*, ante, 77.

EJECTMENT.

1. Where, on a motion for a new trial in an action of ejectment, the papers show that the motion is made on behalf of a party whose interest in the premises is at least doubtful, on a case where consent has been given to the judgment, such motion being made by an attorney who is not shown to have had any authority, and where it is very uncertain upon the papers what are the actual facts, and whether a case is made out for a new trial within the statute (3 R. S., 309, as amended by chapter 485, Laws of 1862), the motion should be denied. (*Sacia* agt. *O'Connor*, ante, 420.)
2. If the taking of judgment by consent was a default, the defendant should make his motion under section 88, and satisfy the court by affidavit that the ends of justice would be promoted, and the rights of the parties "more satisfactorily ascertained and established." (*Id.*)
3. Plaintiff recovered judgment in an action of ejectment and was put in possession of the premises; defendant paid the costs and took a new trial under the statute, thereupon plaintiff, still retaining

possession, moved for leave to discontinue on payment of costs:

Held, that in denying the motion the court below did not exceed its discretion. (*Carlton* agt. *Darcy*, 75 N. Y., 375.)

ELECTION LAW.

1. The board of county canvassers are only to send back the returns to the town or ward inspectors, when it shall clearly appear to them that certain omissions have been made, or that any mistakes, which are merely clerical, exist. (*The People ex rel. Hatzel* agt. *Board of Supervisors*, ante, 141.)
2. Where the relator, who asks for a *mandamus* to compel the county canvassers to send back the returns to the ward inspectors for correction, in his affidavit alleges matters which, assuming them to be true, show that there is no clerical error in the case, but that there has been a false and fraudulent alteration of the returns:
Held, that if the returns have been fraudulently altered the inspectors or others who have made such alterations are criminally liable for their wrongful acts; but the question whether such fraud has been committed cannot be properly tried in a proceeding to compel the canvassing of the votes. (*Id.*)
3. In an action in the nature of a *quo warranto* the court can go behind the certificates of inspectors and canvassers, and the voter can be examined as a witness to prove for whom he cast his ballot. But in a proceeding to compel the canvassing of the votes, where the officers to whom the writ is to be directed are merely ministerial officers, deriving their powers solely from the statutes, and having no power to examine witnesses to enable them to get at the real truth, the granting of the writ would be useless and nugatory. (*Id.*)

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4. Although inspectors of election are guilty of an irregularity in not complying with the law which makes it the duty of inspectors "to securely paste or attach to each statement of the canvass one ballot of each kind found to have been given for the officers to be chosen at the election," &c., &c., as provided in section 54 of the act of 1872 (*chapter 675*), such an irregularity cannot be availed of by one who does not show himself to have been injured thereby. (*Id.*)

5. To entitle a party to a writ of *mandamus* two things must appear: First, that he has a legal right to have something done by the party to whom he seeks to have the writ directed, and which has not been done; and secondly, that he has no specific legal remedy to which he can resort to compel the performance of that duty. (*Id.*)

6. Accordingly, *held*, that as the relator will have an opportunity of contesting the right of his opponent before the board of aldermen, and by the charter such board is made the judge of the election returns and qualifications of its own members, subject, however, to the review of any court of competent jurisdiction, thus giving the relator, if aggrieved, a remedy at law, a *mandamus* will not lie.

Held, further, that as this application is made to the court within twenty-four hours of the time fixed by the board of canvassers for their final adjournment, and to issue the writ might work great injustice and cause increased expense, the elementary rule should be followed, that the writ should not be issued where the party has not a perfectly clear legal right to demand that for which he asks. (*Id.*)

7. Prior to 1873 the charter of the city of New York provided that each board of the common council should "be the judge of the

election returns and qualifications of its own members" (*Laws of 1857, vol. 1, page 875*):

Held, that the decision of the board of aldermen in such cases could not be reversed or set aside by the court.

Held, further, that the change in the phraseology of the charter of 1873 does not give to the court the power, in an action in the nature of a *quo warranto*, to pass upon the question of title to the office of alderman where the board has declared in favor of such right. (*The People ex rel. Hatesel agt. Hall, ante, 147.*)

8. The charter makes the judgment of the board the subject of review by any court of competent jurisdiction, or, in other words, it permits an appeal to a court of competent jurisdiction from the judgment of the board. But the judgment of the board cannot be reviewed in an action to which the board is not a party, and in which the record of that board is not before the court. (*Id.*)

9. It is the office of the writ of *certiorari* to correct errors of a judicial character committed by an inferior tribunal or body, and that writ brings the record before the court for examination and review, and such writ should be returnable before the general term. In cases of this kind a circuit judge, in a circuit court, cannot sit as an appellate tribunal to review the judgment and decision of an inferior tribunal. (*Id.*)

EQUITABLE CONVERSION.

See WILL.

Giraud agt. Giraud, ante, 175.

EQUITABLE LIEN.

See MORTGAGE.

Kendall agt. Niebuhr, ante, 156.

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ESTOPPEL.

See WILL.

Giraud agt. *Giraud*, ante, 175.

See ASSIGNMENT.

McConnell agt. *Sherwood*, ante, 453.

EVIDENCE.

1. The rule that when an agreement between parties is reduced to writing, it cannot be controverted or varied by parol evidence, applies only to parties to the agreement. But when persons not parties to the agreement, and in no way connected therewith, are interested like judgment creditors, for example, to show what the agreement was, they may resort to parol evidence to show what the real transaction in fact was, notwithstanding the writing. (*Brown* agt. *Thurber et al.*, ante, 95)
2. In an action for goods sold and delivered, where the defense was payment, the plaintiff being the survivor of the firm, the defendant cannot be allowed to testify over plaintiff's objections that he paid the bill in question to the deceased partner (*Code of Civil Procedure*, sec. 829). (*Pettit* agt. *Geesler*, ante, 195.)
3. To identify a particular corporation as the one intended, where a name other than the corporate name is used, parol evidence is allowable to aid in determining the intention of the testator in the use of the words in the bequest. (*Leonard et al* agt. *Davenport*, ante, 384.)
4. The defendant entered into an oral agreement with one Titus to work a farm belonging to the latter upon shares, upon certain terms. Subsequently Titus died, leaving the farm and all the implements thereon to his wife. Thereafter the defendant agreed with the wife, the plaintiff, to work the farm upon the same terms that he had worked it on for her husband.
In an action by the plaintiff to enforce the latter agreement, *held*, that the testimony of the defendant, as to the terms of the agreement made with the deceased, was admissible as against the plaintiff. (*Titus* agt. *O'Connor*, 18 *Hun*, 373.)
5. The plaintiff in error was indicted and convicted of embezzling the funds of a savings bank, of which he was the secretary. Upon the trial, the books of the bank, which were kept by the accused, and in his handwriting, and also a book kept by the treasurer of the bank, showing the amounts paid over to the bank by the accused, were received in evidence:
Held, that as the treasurer's book was kept in the regular course of business of the bank, and as the accused was an officer thereof, it was admissible against the accused to show the amounts received. (*Humphrey* agt. *People*, 18 *Hun*, 398.)
6. The accused offered to show that the other officers of the bank were in complicity with him, and that he made the false entries in the books with their knowledge and approval, and for the purpose of deceiving the bank department at Albany:
Held, that the evidence was properly rejected. (*Id.*)
7. In an action upon a promissory note made by the defendant for the accommodation of the payee, and discounted by the plaintiff, the defendant offered to prove that, when the note was made, the president of the plaintiff agreed that he should not be called on to pay it:
Held, that the evidence was inadmissible (1) because the president had no authority to make such a promise; and (2), because

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- it contradicted the written instrument. (*First National Bank of Whitehall agt. Tisdale*, 18 Hun, 191.)
8. In an action against the surviving partner of a firm, upon a contract made with it, the plaintiff is a competent witness to testify to a personal transaction had with the deceased partner, if the defendant was present at the time of its occurrence. (*Kale agt. Elliott*, 18 Hun, 198.)
 9. Declarations of a party as to the title claimed by him are admissible as evidence if made while he was in possession of the premises in dispute, and it is not necessary that they should have been made while he was actually upon the land. (*Swettenham agt. Leary*, 18 Hun, 284.)
 10. In an action to foreclose a mortgage, given as collateral to a bond, regular and valid upon its face, parol evidence is admissible to show, for the purpose of establishing the defense of usury, that the mortgagor agreed to and did pay interest thereon at the rate of ten per cent per annum. (*Mudgett agt. Goler*, 18 Hun, 302.)
 11. Where, on an application by a child for his share of his father's estate, the executors claim to deduct a sum alleged to have been advanced to him by the deceased, and to prove such advancement, put in evidence an entry made by the testator in one of his books, the child is entitled, under section 829 of the Code of Civil Procedure, to testify in reference to such advancement, and explain or deny such entry. (*Marsh agt. Brown*, 18 Hun, 319.)
 12. A mere entry by a testator in one of his books is not sufficient to show that he has made an advancement to one of his children, unless the fact of such advancement be established by evidence *abunde*. (*Id.*)
 13. What evidence as to the value of services rendered as arbitrator is insufficient to justify a recovery. (*Harrison agt. Ayers*, 18 Hun, 336.)
 14. In an action against the surviving member of a firm, to recover money lent to the deceased partner, where the defense is that the money was not borrowed or used for firm purposes, declarations of the deceased partner to third persons, made after the money was borrowed, to the effect that it was borrowed and used for firm purposes, are admissible as against the surviving partner. (*Klock agt. Beekman*, 18 Hun, 503.)
 15. The defendant in error, Genet, was indicted and convicted of obtaining money from the city of New York on false pretenses. It appeared that in 1870 Genet, being counsel to the commissioners to erect a district court-house in New York, one Davidson applied to him for the contract for the iron work, and was by him referred to one of the commissioners, who said he would see Genet about it. In June, 1871, Davidson saw Genet, receiving from him a memorandum of the work, and made an estimate under his directions. Davidson having refused to deliver the materials, except upon payment of the price, made out a bill, under Genet's direction, for the full amount, showing delivery of all the iron work during the months of January, February, March, April, May and June, 1871, as per agreement with commissioners, when in fact none of it had been delivered. Genet having procured the certificate of the commissioners to the bill, sent it to the comptroller's office, where it was audited, and a warrant prepared and signed by the comptroller and mayor. The auditing and signing of the warrant were based upon the bill certified by the commissioners. Thereafter Genet

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drew the money upon the warrant as the attorney of Davidson:

Held, that these facts warranted a conviction of the defendant of obtaining money under false pretenses. (*People* agt. *Genet*, 19 *Hun*, 91.)

16. On cross-examination, leading questions tending to elicit new matter are not allowed as a matter of right. (*Id.*)

17. As to the proper limits of a cross-examination of the accused offering himself as a witness in his own behalf. (*Id.*)

18. Probate of the second codicil of the testator's will, by which the respondent was appointed one of his executors, was opposed by his three daughters and one other legatee, on the ground that he was incompetent to execute a will at the time of its date, and also on the ground of undue influence exerted by the respondent. Upon the hearing, the contestants called the physician who had attended the deceased for eight years previous to his decease, for the purpose of showing that he was incompetent to make a will at the time of executing the codicil. The physician having stated that all his knowledge was derived from what he observed while he was attending the deceased professionally, his evidence was excluded by the surrogate:

Held, that the evidence was not prohibited by section 834 of the Code of Civil Procedure, as being information acquired while attending the deceased professionally, and which was necessary to enable him to do so. (*Staunton* agt. *Parker*, 19 *Hun*, 55.)

19. That even if the prohibition therein contained were applicable, the contestants, as the personal representatives of the deceased, might waive it. (*Id.*)

20. This action was brought upon a

promissory note, made by the defendants to one Ely, the plaintiff's testator. The note read: "One day after date I promise to pay," and was signed by both defendants. Upon the trial, the defendant, J. B. Clute, to establish the defense of usury, called his co-defendant, and offered to prove by him the usurious agreement made with the deceased, the offer expressly stating that the evidence was to be used solely for the benefit of the defendant, J. B. Clute, and not in behalf of the witness. Under the plaintiff's objection, the evidence was excluded as inadmissible under section 829 of the Code of Civil Procedure:

Held, that the note was, in law, a joint and several one, and that separate judgments might be rendered against the two makers.

That as the testimony of the witness was to be used solely in behalf of his co-defendant, and not in his own behalf or interest, it was not excluded by section 829 of the Code of Civil Procedure, but should have been received. (*Ely* agt. *Clute*, 19 *Hun*, 35.)

21. While a prisoner indicted for murder was at the station-house, and after the watch of the deceased had been found upon him, he was asked by an officer where the rest of the jewelry was, and replied that he knew nothing about it. Subsequently, the question being repeated, he asked, "Will you do me a favor." The officer said "I will if I can; I sympathize with you, or I pity you; you are in a bad fix." The prisoner then asked him to send his clothes to his mother and not let her know what had happened. The prisoner then, in answer to a question by another person, made a detailed statement of what he had done:

Held, that his confession was properly admitted on the trial. (*Cox* agt. *People*, 19 *Hun*, 430.)

22. A prisoner indicted for murder, after the killing, fled from the city

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of New York, where it occurred, finally stopping at Wheeling, W. Va., where he was arrested by an officer of the New York police force, with the co-operation and assistance of the local police, but without any process, put in irons and taken to New York; while on the cars he was asked by the officer if he killed his wife and said, "Yes:"

Held, that conceding that he was illegally held in custody at the time he made the confession, that fact did not invalidate it or render it inadmissible. (*Balbo* agt. *People*, 19 *Hun*, 424.)

23. Upon the trial of an indictment for conveying property with intent to defraud the grantor's creditors, the district attorney was allowed to prove that the prisoner had been examined in supplementary proceedings, and that his signature to the examination, which was produced in court, was genuine. The district attorney then read from the examination, and asked the prisoner whether the statements so read, or those which he had made upon the trial, were true. The questions were allowed against the objection and exception of the prisoner's counsel:

Held, that the evidence was inadmissible under Code, section 292. (*Loomis* agt. *People*, 19 *Hun*, 601.)

24. The plaintiff presented to the defendants, as executors, a claim for services rendered to their testator, the plaintiff's father. Upon the trial on a reference, under the statute, a sister of the plaintiff, who was also a legatee under the will, and her husband, were allowed, against the defendants' objection and exception, to testify as to the employment of the plaintiff by the testator, and as to his promise to pay her wages for her services:

Held, that the evidence was properly received. (*Pursell* agt. *Fay*, 19 *Hun*, 595.)

25. Upon the trial of an action against a railroad company for an injury caused to one of its employes, by the alleged failure of defendant to provide a sufficient number of employes to do the work; evidence showing the employment of additional servants thereby, after the accident, was held to be admissible. (*Harvey* agt. *N. Y. C. and H. R. R. R. Co.*, 19 *Hun*, 556.)

26. Where upon the trial the plaintiff offered to prove that the switchman employed at the time of the accident had complained to his superiors that the services required of him were too much work for one man to do, and that he had not the requisite experience to perform them, *held*, error for the court to refuse to admit the evidence. (*Id.*)

27. Although, in an action to recover damages for personal injuries, a married woman cannot recover on the ground of her inability to render services which are due or belong to her husband, yet she may recover for the loss of such as are personal to herself. (*Minick* agt. *City of Troy*, 19 *Hun*, 253.)

28. In determining the personal loss to herself, evidence as to who composed her family, and as to what she did before the injury, and how she was affected by it, and as to the pain and suffering endured, is competent. (*Id.*)

29. Section 248 of 2 Revised Statutes, 270, providing that the proceedings in any cause, had before a justice of the peace, may be proved by his oath, does not authorize a judgment recovered before him to be established by his parol testimony as to the proceedings had before him, without the production of his docket; in such case the judgment can only be proved by the production and verification of the docket

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- itself. (*Dorr* agt. *City of Troy*, 19 *Hun*, 233.)
80. In an action involving the question of the existence of a highway, plaintiff was not allowed to testify to declarations made to him by his grantor to the effect that the attempt to open a road had been abandoned and the commissioners had refused to open it further, and for that reason his grantor had fenced it up. (*McCarthy* agt. *Whalen*, 19 *Hun*, 508.)
81. What acts accompanying threats by a debtor to make an assignment with preferences are evidences of a fraudulent intent to dispose of his property. (*Anthony* agt. *Stype*, 19 *Hun*, 265.)
82. Plaintiff in error was indicted and tried for stealing rope from a vessel named in the indictment. Upon the trial a witness was allowed to testify that another rope, found with that charged in the indictment to have been stolen, had been stolen from another vessel; no evidence was given as to the time this rope was stolen, or which tended to show it had ever been in the prisoner's possession:
Held, that the evidence was improperly admitted. (*Boland* agt. *People*, 19 *Hun*, 80.)
83. Upon a trial of an action to recover damages for negligent killing, the plaintiff offered to prove declarations of the deceased, as to the manner in which the injuries were received, made shortly before his death, and some two hours after the accident:
Held, that the declarations were not admissible as part of the *res gestae* nor as declarations made in *extremis*. (*Walden* agt. *N. Y. C. and H. R. R. Co.*, 19 *Hun*, 69.)
84. Declarations made in expectation of immediate death are only admissible on the trial of an indictment for homicide. (*Id.*)
85. The fact that an alderman of a city saw an excavation being made, which being left unguarded caused an injury to a party falling into it, is not evidence *per se* that the city was guilty of negligence. (*McDermott* agt. *City of Kingston*, 19 *Hun*, 198.)
86. The seal of a corporation affixed to an instrument proves itself, and is presumptive evidence that it was affixed by due authority. (*Canandargua Academy* agt. *McKee*, 19 *Hun*, 62.)
87. A certificate of proof or acknowledgment in due form proves itself, and no proof of its genuineness is required. (*Id.*)
88. This action was upon a promissory note; the defense was that the alleged signature of defendant's intestate, as maker, was a forgery. Upon the trial, a cashier of a bank, as a witness for plaintiff to prove the handwriting, was asked if the deceased, in his lifetime, had presented instruments with his signature at the bank for the purpose of having them discounted; this was objected to, the objection being to that portion of the question calling for the purpose; the objection was overruled, and exception taken. The witness answered that the deceased did present instruments containing his signature to the bank:
Held, that as the witness simply answered that portion of the question conceded to be proper, the exception was not available. (*Bardin* agt. *Stevenson*, 75 *N. Y.*, 164.)
89. A witness, who had testified that he had seen deceased subscribe his name to various papers passing between them, was permitted to testify as to what kind of instruments these papers were:
Held, no error; that while it would not be competent to go into detail as to the contents of the papers, it was competent upon the point of witness' knowledge of the

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- handwriting to show the nature of the signatures he had seen — *i. e.*, that they were of an important character, which might call more particular attention of the witness to them. (*Id.*)
40. T. a witness for plaintiff, testified as to a conversation with deceased and the date of a transaction with him. A. a witness called by defendant, gave testimony showing the testimony of T. to be untrue. T. was subsequently recalled, and was asked and permitted to answer under objection and exception as to what he had ascertained from examination of the books of the bank; his answer corroborated the testimony of A., showing he was mistaken in his original testimony: *Held*, that the question was improper; but the answer could not have damaged defendant, and the exception, therefore, was not good. (*Id.*)
41. The note in suit was for \$1,000, payable with interest at six per cent. Plaintiff was permitted to prove, under objection and exception, statements of the deceased, made soon after the date of the note, to the effect that he had borrowed \$1,000 of plaintiff and given his note for it at six per cent: *Held*, no error. (*Id.*)
42. Where the genuineness of a signature is in question in an action, experts in handwriting who have no other knowledge of the handwriting of the person whose signature the one in question purports to be, than that derived by a comparison in court of such signature with other signatures of the person to instruments proved and properly in evidence, are competent as witnesses to give their opinion, derived from such comparison, as to the genuineness of the disputed signature, and as to whether it appears a natural or simulated hand. (*Miles agt. Loomis, 75 N. Y., 287.*)
43. As to whether where it clearly appears, either by the avowal of the party offering them or otherwise, that the instruments were put in evidence simply for the purpose of comparison, the failure to object precludes the other party from subsequently resisting their use for that purpose, *quære*. (*Id.*)
44. The court cannot take judicial notice of a custom in the city of New York in improving streets, first to regulate and grade, and then to pave as separate and distinct works; if such custom exists it must be proved. (*In re Walter, 75 N. Y., 355.*)
45. The recitals in a deed from a United States collector of internal revenue are not sufficient *prima facie* to make out a right in him to sell and convey. (*Brown agt. Goodwin, 75 N. Y., 409.*)
46. Where in an action upon a promissory note indorsed by defendant for the accommodation of S. & H., defendant offered to prove that a sum of money paid by S. to plaintiff without direction as to application, and which was applied by plaintiff upon another note made by S. & H., held by him, was raised by the makers upon a note indorsed by defendant for the purpose of having the proceeds applied upon the note in suit: *Held*, that in the absence of proof, or of an offer to prove, that knowledge of this fact was communicated to plaintiff, the evidence was properly excluded. (*Harding agt. Tipt, 75 N. Y., 461.*)
47. As to whether a record of conviction of a witness for a felony, where it does not disqualify, is evidence in a civil action for the purpose of impeachment, *quære*. (*Sims agt. Sims, 75 N. Y., 406.*)
48. If competent, the record is not conclusive as to the fact of the

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- commission of the crime charged, but may be rebutted. (*Id.*)
49. Defendant having testified as a witness in his own behalf, a record of his conviction in the State of Ohio for a felony was offered by plaintiff and received in evidence. Defendant was thereupon asked by his counsel whether he was guilty of the offense of which he had been convicted. This was objected to and excluded:
Held, error. (*Id.*)
50. An instrument executed by plaintiff in this form, "Received of D. M. Peyser five hundred dollars due on demand," was set up as a counter-claim; *held*, that it was open to explanation as to its consideration, and the circumstances under which it was given; and that, evidence having been received without objection, tending to show that it was given upon payment by Peyser to plaintiff of the sum specified, which was then due from the former to the latter, and was intended simply as a receipt, a submission of the question to the jury, and a finding to that effect were justified. (*De Lavalletts* agt. *Wendt*, 75 N. Y., 579.)
51. Upon the trial of an indictment for obtaining goods under false representations as to solvency, *held*, that schedules of his assets and liabilities, made by the prisoner in proceedings in bankruptcy, were competent as evidence to show the falsity of the representations. (*Abbott* agt. *People*, 75 N. Y., 602.)
52. In equitable action by principal against agent, to compel return of negotiable obligations, executed by the former in the hands of the latter, or to recover their value, the value is *prima facie* the amount unpaid upon the instruments; this may be met by proof of inability to pay, but not by proof of market value. (*See West. R. R. Co.* agt. *Bayne*, 75 N. Y., 1.)
53. When memorandum made by maker of note on stub thereto, which note is made payable to executor of deceased, and is presented by him as a claim against the estate, is not conclusive evidence that note was a gift. (*See Cowee* agt. *Cornell*, 75 N. Y., 91.)
54. Plaintiff agreed to sell, and defendant to purchase, 12,000 hop poles, at seventy dollars per thousand. Two papers were prepared, one written by plaintiff and signed by defendant's agent, the other, a printed form, filled up and signed by plaintiff. The agreement was stated substantially alike in each, with this exception; the former contained this clause, "no objection to any kind of cedar;" while the latter required "said poles to be of yellow cedar, first growth:"
Held, that evidence of conversations between the parties, at the time, was competent upon the question as to which was intended as the contract. (*Hill* agt. *Miller*, 76 N. Y., 82.)
55. In an action upon an alleged judgment of the supreme judicial court of the state of Maine, the copy of the judgment record, offered in evidence by plaintiff, purported to be attested by the clerk under the seal of the court; following the copy thus attested, and attached thereto, was a copy of an execution, attested in like manner, the attestation being of a subsequent date to that of the record; immediately following the last attestation, and attached thereto, was a certificate of the chief justice of the court, to the effect, that the one who signed as clerk is the clerk of the court; "that the foregoing signature, purporting to be his is genuine, and that the seal thereto, by him affixed, is the seal of said supreme judicial court, and that the foregoing attestation is in due form of law." The copy of the record was objected to as not properly exem-

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plified; the objection was overruled:

Held, error; that as the certificate speaks of but one attestation, seal and signature, and speaks of the "foregoing," it referred only to the last preceding attestation, i. e., the one to the copy execution; and that, therefore, there was no certificate authenticating the copy of the record, as prescribed by the act of congress (*U. S. R. S.*, 170, sec. 905). (*Burnell* agt. *Weld*, 76 *N. Y.*, 103.)

56. In an action against a sheriff for a false return to an execution in an action of replevin, defendant offered in evidence a chattel mortgage, purporting to cover the property, given by one A. H. to M. There was no allegation in the answer or offer to prove that plaintiff did not own the property, or that M. did own it or have any right to the possession thereof:

Held, that the mortgage was properly excluded. (*Hoffman* agt. *Conner*, 76 *N. Y.*, 121.)

57. For the purpose of proving value, plaintiff was allowed to testify, under objection and exception, as to what she gave for the property:
Held, no error. (*Id.*)

58. At the time the objection was made, it did not appear when the property was purchased by plaintiff; subsequently, it appeared that the purchase was made ten years prior to the false return; the objection was in no way renewed:

Held, that there was no exception to present the point upon appeal, that evidence of the purchase-price so long before was incompetent. (*Id.*)

59. In an action to recover damages for alleged negligence in leaving an excavation in a street unprotected, a witness for plaintiff was asked, in reference to another accident occurring at the same place, "Do you know any thing about a party recovering a judg-

ment of \$5,000?" This was objected to and objection overruled. The witness answered, in substance, that he did not know any thing about it, but heard "from some parties outside that there was such a thing."

Held, that the question was incompetent, and that the latter part of the answer was not so irresponsible as to relieve plaintiff from the responsibility of it; that to avoid such responsibility he should, at least, have disclaimed the answer and declined to receive it. (*O'Hagan* agt. *Dillon*, 76 *N. Y.*, 170.)

60. A witness, on the part of defendant, who had testified that he hung a lamp, on the evening of the accident, near the excavation, and about the hour in the morning when he removed it, was asked, "Is your recollection refreshed or your attention called to that (the time of removal) from any circumstance, any accident that happened then?" This was objected to and excluded:
Held, error. (*Id.*)

61. While a party cannot cross-examine his own witness, and is in general bound by the answers made, it is not objectionable after a witness has given an ambiguous answer to inquire as to any circumstance or fact tending to enable him to recollect the fact sought to be proved more clearly or certainly. (*Id.*)

62. A witness for the prosecution, upon an indictment for forgery in swearing to an affidavit by prisoner as president of an insurance company, after testifying that upon applying to the prisoner for information, he was referred to R., the prisoner stating, in substance, that R. was the book-keeper and chief man, and would furnish whatever information was contained in the books, was permitted to testify, under objection and exception, to declarations of

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R., in the absence of the prisoner, to the effect that certain entries in the books of the company, as to policies issued, were false, and that the prisoner knew of it:

Held, error; that the reference to R. did not confer authority upon him to bind the prisoner by his declarations. (*Lambert* agt. *People*, 76 N. Y., 230.)

63. The affidavit purported to have been sworn to before a notary public. The prosecution proved that M., the alleged notary, had acted as such for some years, and produced a book from the county clerk's office containing a list of notaries, the time of their appointments, etc., among which appeared the name of M. Defendant in error offered to prove that M., at the time of his alleged appointment, and at the date of the verification, was a resident in the state of New Jersey. This evidence was rejected:

Held, error; that it was necessary for the prosecution to show that the oath was taken before a *de jure* or *de facto* officer; that the evidence given for that purpose was, at best, but *prima facie*, and proof that the alleged notary was a non-resident, and so incapable of holding the office (1 R. S., 116, sec. 1) was competent to rebut any presumption arising from such evidence. (*Id.*)

64. In an action upon a note the makers admitted the execution thereof by them, but denied the indorsement by the payee, and alleged that the note was not made for value, but was fraudulently obtained by the payee, and that the plaintiff was not a holder for value. On the trial plaintiff's book-keeper, called by them as a witness to prove the indorsement, on cross-examination, testified, in substance, that he received the note before maturity, and that he gave nothing when he received it. On re-direct examination he testified, that for the note he sur-

rendered, a short time after he received it, two other notes of the payees held by plaintiffs, which had been protested. Defendants offered to prove that the note was given without consideration, it having been sent by them to the payee to take up another note given as collateral security, for his accommodation, and that he did not take up the other note; this was objected to, upon the ground that defendants had not laid any foundation for the evidence, by showing that plaintiffs were not innocent holders for value. The objection was sustained:

Held, error; that if the offered proof had been made the burden would have been cast upon plaintiffs to show that they were *bona fide* holders for value; and that defendants did not lose the benefit of their exceptions by giving other evidence in an ineffectual attempt to lay a foundation for the rejected testimony in accordance with the ruling of the court. (*Nickerson* agt. *Ruger*, 76 N. Y., 279.)

65. Where, upon a criminal trial, the accused is offered as a witness in his own behalf, to entitle the prosecution, to put to him, upon cross-examination, questions which are irrelevant to the issue and are calculated to prejudice him with the jury, they must, at least, be such as clearly go to impeach his general moral character and his credibility, as a witness. (*People* agt. *Crapo*, 76 N. Y., 288.)

66. As to whether, even then, the questions would be competent, *quære*. (*Id.*)

67. Upon the trial of an indictment for burglary and larceny, the prisoner, on cross-examination, was asked if he had not been arrested on a charge of bigamy; this was objected to; objection overruled:

Held (*FOLGER* and *EARL*, JJ., *dissenting*), error; that it did not

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legitimately tend to impair the credibility of the witness, and was incompetent for any purpose. (*Id.*)

68. The property stolen was about six bushels of wheat. It was proved, on the part of the prosecution, that a small quantity of wheat, of the same kind as that stolen, was found in the pocket of the prisoner by a police officer, who testified that the prisoner said it was a sample "fetched up to sell by," and that he had sold some wheat to S. & G., millers, at W. One of that firm testified that he purchased about six bushels of some man, but did not identify the prisoner as the man. The prisoner, as a witness, denied making the statement as to the wheat, and offered to prove that about that time he had sold wheat at another place. This was objected to, and rejected:

Held (EARL, J., *dissenting*), error. (*Id.*)

69. In an application for a policy, the insured answered "No" to a question as to whether any member of his family "had died or been afflicted with insanity * * or other hereditary disease." It was stated, however, that his father had died of a brain disease, caused by a hurt. In an action upon the policy, defendant claimed the answer untrue, and gave in evidence copies of entries in the records of a probate court of Ohio, determining the insured to be insane, and ordering him to be sent to a lunatic asylum; also records of the asylum showing that he had been admitted therein. The mother of the insured testified that her husband received an injury on his head in childhood; that for many years before his death he was afflicted with pains in his head, of which he complained, referring to the hurt he had received; that later he showed signs of weakening of mental powers, which continued and increased until his death, but that

to the end he knew what was going on; that he was sent to the asylum by friends for quiet and treatment. It did not appear that he was subject to any delusions or acted irrationally. After death an autopsy disclosed that his disease was hardening of the brain:

Held, that the records were not conclusive, as against plaintiff, as to the insanity of the father; nor did the evidence authorize the court to determine, as a question of law, that the answer was untrue. (*Newton* agt. *Mut. Ben. L. Ins. Co.*, 76 N. Y., 428.)

70. As to whether the records were competent evidence, *quære*. (*Id.*)

71. While it is competent for a party to show that a witness who has testified against him is hostile to him, the evidence to establish it should be direct and pointed; the court is not bound to receive evidence of a remote and uncertain bearing. (*Gale* agt. *N. Y. C. and H. R. R. Co.*, 76 N. Y., 594.)

72. Defendant offered to show that one of plaintiff's witnesses had, prior to the accident as to which he testified, applied for a position upon its road, and had been refused:

Held, that the rejection thereof was not error. (*Id.*)

73. Where, in an action to recover a balance of an alleged loan, the question was as to whether the loan was made to defendant or to other parties through defendant as their agent, *held*, that entries made in plaintiff's books, without defendant's knowledge or consent, were not competent evidence that the loan was made to or upon the credit of defendant. (*Peck* agt. *Von Keller*, 76 N. Y., 604.)

EXCEPTION.

See CRIMINAL LAW.

The People agt. *Moett*, ante, 467.

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1. An objection as follow: "I desire to except to your honor's statement to the jury of evidence, or supposed evidence, connected with the accident or causing it," is too general and vague to be available as a ground of error. (*Minick agt. City of Troy*, 19 Hun, 253.)
2. An error in the charge of the court upon a criminal trial can only be availed of in this court upon exceptions duly taken on the trial. (*Brotherton agt. People*, 75 N. Y., 159.)
3. A general exception to all of charge upon a particular point, is unavailable here when a portion of the charge is correct; the attention of the court must be called to the erroneous portions. (*Arnold agt. People*, 75 N. Y., 608.)

EXECUTION.

1. An execution against the person, which recites that an execution has been issued to the proper county, and returned unsatisfied is insufficient. It must specify the county *eo nomine*, and if it does not, the defendant may be discharged on *habeas corpus*. (*The People ex rel. Brack agt. Reilly*, ante, 218.)
2. When part of a judgment for a tort is assigned, execution against the person may still issue in the name of the assignor for the full amount of the judgment. (*Dougherty agt. Gardner*, ante, 284.)
3. A judgment for damages resulting from personal injuries is assignable in whole or in part. The right to imprison is not lost. (*Id.*)
4. Property of the defendant having been levied upon under executions, issued upon judgments recovered against it by the plaintiff and another, the same was, by an order of the court, made on April 23, 1873, directed to be sold under the said executions, subject to the approval of the court. The property was sold April twenty-ninth, and was purchased by the plaintiff, at a price in excess of the amount due on all the judgments. No money was paid, but a bond was given conditioned that the purchaser would bring the money into court, or pay the same over as the court might direct. On May fourteenth the sale was approved by the court. Prior thereto and on May fourth, the plaintiff recovered another judgment against the defendant, exceeding in amount the surplus which had arisen on the sale, and on that day issued an execution to the same sheriff.

July 16, 1878, the appellant was appointed receiver of the defendant, and thereafter applied to have the surplus paid over to him:

Held, that this application was properly denied, and that the plaintiff was entitled to have it applied upon his judgment of May fourth. (*First Nat. Bank agt. Whitehall Trans. Co.*, 18 Hun, 161.)

5. In November, 1874, one Snedeker conveyed certain premises to one Campbell, the deed being recorded June 9, 1875. June 8, 1875, Campbell reconveyed the premises to Snedeker's wife, the deed being recorded in August, 1875. In July, 1875, judgments were recovered against Snedeker, and the premises sold upon executions issued thereon to one Carman, to whom, on the expiration of fifteen months, a deed was delivered by the sheriff. The premises having been sold on the foreclosure of a mortgage executed prior to November, 1874, Carman claimed to be entitled to the surplus moneys:

Held, that as Snedeker had no title to the premises when the judgments were docketed, Car-

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- man acquired none on the sheriff's sale, and had, therefore, no interest in the surplus moneys. (*Snedeker agt. Snedeker*, 18 Hun, 855.)
6. That even if the conveyance to Campbell was fraudulent, Carman was not in a position to attack it in proceedings for the distribution of such surplus. (*Id.*)
 7. One purchasing in good faith, at a sheriff's sale, under execution, goods in the possession of the judgment debtor, is not liable to an action brought by the true owner to recover the goods, or their value, until a demand therefor has been made and refused. (*Rawley agt. Brown*, 18 Hun, 456.)
 8. An execution having been delivered to the sheriff, he went to the office of the defendant, a lawyer, and found him out; he then went to the defendant's farm, looked over certain articles of personal property and made a minute of them; he then returned to the defendant's office, and finding him still out, he looked over his library, opened the cases, handled the books and made a memorandum of them. On the next day he saw the defendant, showed him the execution and told him he had levied on the books:
Held, that the levy was sufficient as against a subsequent purchaser from the defendant. (*Dean agt. Campbell*, 19 Hun, 584.)
 9. That such levy continued in force for the benefit of executions received by the same sheriff subsequently and up to the time that the execution under which the levy was made was paid. Except as against a purchaser in good faith, the goods of the debtor are bound from the time of the delivery of the execution to the sheriff. (*Id.*)
 10. The notice of a sale of chattels under an execution, required to be given by section 21 of 2 Revised Statutes, 366, need not describe the execution, nor give the name of the judgment debtor. (*Chapman agt. Morrill*, 19 Hun, 818.)
 11. On December 3, 1875, the plaintiff delivered an execution to one Paine, a deputy of the defendant. The defendant was then sheriff of Monroe county, his term of office expiring on the last of that month. The execution not being paid in sixty days, it was held by Paine, with the knowledge and consent of the plaintiff and the sheriff, in the expectation that the debtor would pay it later. Thereafter the debtor paid the amount thereof to Paine, who returned the execution as satisfied, in the name of the defendant, as late sheriff, but did not pay over the money so received to either the plaintiff or the sheriff. In an action against the sheriff to recover the amount so received by his deputy, *held*, that the plaintiff was entitled to recover. (*Ross agt. Campbell*, 19 Hun, 615.)
 12. Under an execution, in the usual form in an action for the claim and delivery of personal property, it is the duty of the sheriff to take and deliver the property as commanded, not only if he finds it in the possession of any person named therein, but also if he finds it in the possession of any other person; unless he can justify his refusal to do so by showing that such person has a title or right of possession superior to that of the party to whom he is commanded to deliver it. (*Hoffman agt. Conner*, 76 N. Y., 121.)
 13. Where, therefore, to such an execution, the sheriff returned that he could not find the property so as to make delivery, and it appeared, in an action against him for a false return, that he knew where the property was within his county, and could have found

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it, but refused to take it or to take any action in regard thereto, upon the sole ground that it was in the possession of one M., *held*, that in the absence of proof that M. had any title to the property or right to the possession as against plaintiff, the sheriff was liable. (*Id.*)

EXECUTORS AND ADMINISTRATORS.

1. Where a complaint, in an action to foreclose a mortgage executed by the defendant, as executor, alleges that he executed it as such executor:

Held, that the complaint was sufficient, and that it was unnecessary to allege the defendant's appointment as executor; he is presumed to be such as he has described himself. (*Kingsland agt. Stokes and others, ante, 1.*)

2. Where an action was brought by plaintiff against the defendant, who was a practicing physician and surgeon, to recover damages alleged to have been caused by his improper and unskillful treatment of the plaintiff, who had sustained a fracture of the bones of her wrist and employed the defendant in his professional capacity to treat the same, and pending the suit the defendant died:

Held, that the action does not survive against the defendant's executors, the injuries alleged to have been sustained by the plaintiff being injuries to her person and not to her estate. (*Best agt. Vedder, ante, 187.*)

3. Pain and bodily injuries do not possess such transmissible qualities as to compel the living to atone for such as the dead inflicted, nor to entitle them to receive satisfaction for such as the dead suffered. (*Id.*)

See SUPPLEMENTARY PROCEEDINGS.
Pardee agt. Tilton, ante, 476.

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4. Where an executor appeals from a decree of the surrogate, entered upon the final settlement of his accounts, and the petition of appeal contains a specification of but one item, the respondent may set forth so many items of the account as he may claim to be erroneous, as against him and in favor of the appellant, though the error be one which is prejudicial to the respondent, only in common with all the other beneficiaries, none of whom have appealed or applied to be made respondents. (*Osw agt. Schermerhorn, 18 Hun, 18.*)

5. Where an executor sells real estate, subject to mortgages, he is entitled to commissions on the whole purchase-price, including the amount secured to be paid by the mortgages, and is not limited to commissions on what remains after deducting the amount of the mortgages therefrom. (*Id.*)

6. When an architect has presented a bill for services in preparing plans and specifications, and subsequently, it not having been paid, he presents a claim against the estate of his employer for the same services, largely exceeding the amount of such bill, a refusal of the executor to pay the same is not unreasonable, and the estate should not be charged with the costs of an unsuccessful defense before a referee appointed under the statute. (*Harrison agt. Ayers, 18 Hun, 836.*)

7. In 1866 one Rinchy, an inhabitant of the city of New York, died in Mexico, leaving a widow and an infant son. In 1868 the interest of the infant in certain land inherited from his father was sold, under the direction of the court, and a mortgage for a portion of the purchase-money was given to the special guardian of the infant, upon the foreclosure of which in this action, in 1878, the premises were purchased by

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one Doughty. The latter refused to complete his purchase, on the ground that a claim still existed unpaid against the estate of the said Rinchy, and that no letters of administration had even been issued thereon:

Held, that he was properly compelled to complete his purchase, as the time mentioned in chapter 211 of 1873, within which an application for the sale of land for the payment of debts must be made, had elapsed, and by reason of the restrictions contained in said act, the land could not be sold to pay the claim. (*Parkinson* agt. *Jacobson*, 18 *Hun*, 853.)

8. Where upon appeal to the general term from a judgment entered upon the report of a referee, appointed under the provisions of the Revised Statutes to determine as to the validity of a claim against the estate of a deceased person, disputed by his administrator, the judgment is set aside and the order of reference vacated, the court at special term has power to refer the case to a new referee to hear and determine, even though the action be one in which a compulsory reference cannot ordinarily be ordered. (*Masten* agt. *Budington*, 18 *Hun*, 105.)

9. The sureties to a bond, given by a non-resident executor, are proper parties defendant to an action brought to procure his removal on the ground of mismanagement, and to compel him to account for and pay over any money in his hands. (*Hood* agt. *Hood*, 19 *Hun*, 800.)

10. Where, upon the trial of an action, brought by a legatee and next of kin, to procure the removal of an executor, and compel him to account, it appears that the plaintiff has assigned his interest in the estate as security for a debt, the court may direct the party holding it as security to be brought in as a defendant. (*Id.*)

11. Legatees under a will may enforce a bond given by a non-resident executor, though not parties to it. (*Id.*)

12. An accounting before the surrogate is absolutely void as to heirs and next of kin not notified thereof. (*Id.*)

13. October 24, 1878, the plaintiff presented to the defendants a claim for services rendered in attending upon their testator (the plaintiff's father) and his wife, amounting to \$1,551.50, claiming wages at the rate of three dollars per week. On December 9, 1878, the defendants rejected the claim and consented to a reference, upon which the plaintiff recovered \$674, the referee fixing the wages at two dollars per week. The referee also found that the defendants acted with prudence and in good faith in resisting the payment of plaintiff's claim:

Held, that an order awarding costs to the plaintiff was erroneous and should be reversed. (*Pursell* agt. *Fry*, 19 *Hun*, 595.)

EXTRA ALLOWANCE.

1. Where, after an action of foreclosure was at issue and had been noticed for trial, the defendant tendered the amount of the mortgage, interest and costs, a statement of which had been rendered by the plaintiff's attorney and the tender being accepted, it is too late thereafter to apply for an extra allowance. Had the tender been conditionally received it might be otherwise. (*Lockman* agt. *Ellis and others*; ante, 100.)

2. *New York Fire and Marine Insurance Company* agt. *Brownell* (9 *How. Prac. R.*, 898) distinguished. (*Id.*)

3. Under section 809 of the Code the successful party can recover only one extra allowance, although

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the case may have been tried several times. (*Flynn* agt. *Equitable Life Assurance Society*, 18 *Hun*, 212.)

4. Where, in proceedings *de lunatico inquirendo*, an inquisition is found in favor of the alleged lunatic, the court cannot grant an allowance for counsel fees, expert witnesses, etc., to him, and charge the same upon the petitioner. (*Matter of McAdams*, 19 *Hun*, 292.)

FALSE IMPRISONMENT.

1. An action for false imprisonment will lie for, and immediately upon, an illegal arrest. (*Dusenbury* agt. *Kielly*, *ante*, 286.)
2. Consequently, the statute of limitations begins to run from the time of such illegal arrest, and the cause of action therefor is barred at the end of two years from such arrest, although the proceedings in which the arrest took place are continued within the two years. (*Id.*)

FIDUCIARY CAPACITY.

1. In an action brought to recover money alleged to have been received by defendant in a fiduciary capacity, plaintiff must establish, on the trial, the fiduciary relation, or he cannot recover. (*Obregon* agt. *De Mier*, *ante*, 801.)
2. But, on consent of defendant's attorneys, the complaint may be amended at the trial so as to allege a demand arising from a breach of contract, and judgment rendered on such demand. (*Id.*)
3. What constitutes a fiduciary relation. (*Id.*)
4. Agent's acceptance of his principal's draft, and principal's transfer of such draft, extinguishes

fiduciary relation (*See S. C.*, 53 *How.*, 356; 54 *How.*, 890). (*Id.*)

FINDINGS.

1. It is the duty of a referee to find and set forth in his report the facts upon which his conclusions of law are based; but he is not required to set forth or explain the means or processes by which he arrived at such findings of fact. (*Dolan* agt. *Merritt*, 18 *Hun*, 27.)^a
2. A general finding of a referee is controlled by a special finding of fact. (*Bennett* agt. *Buchan*, 76 *N. Y.*, 886.)

FORECLOSURE.

1. Where, after the filing of a notice of *lis pendens* in accordance with section 182 of the Code of Procedure, and service of summons upon one or more of the defendants in an action for the foreclosure of a mortgage, a judgment is perfected and docketed against the owner of the equity of redemption, the judgment creditor is bound by the judgment in the foreclosure suit, the same as if he were a party thereto; and this, although, at the time of the entry of his judgment, said owner had not been served with summons in the foreclosure suit. The judgment creditor is a subsequent incumbrancer within the meaning of said section. (*Fuller* agt. *Scribner*, 76 *N. Y.*, 190.)
2. The question whether a resale shall be ordered in a foreclosure suit is discretionary with the court below; and an order directing a resale is not reviewable here upon the merits. (*Goodell* agt. *Harrington*, 76 *N. Y.*, 547.)
3. It is not requisite that a person applying for a resale should have a specific lien upon the mortgage

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premises; the court may exercise its power at the instance of any one whose rights are affected by the sale. (*Id.*)

FOREIGN LAWS.

See LANDLORD AND TENANT.

Graves agt. *Cameron*, ante, 75.

GENERAL TERM.

1. Where the allegations of the complaint in an action are put at issue by the answer, and upon the trial are found in favor of plaintiff, but judgment is rendered thereon in favor of defendant, it is error for the general term upon reversal of the judgment to direct judgment for plaintiff; a new trial should be ordered. Defendant having obtained judgment is not called upon to except to the findings, or to insert the evidence in the case to show that they were controverted. (*Ehrichs* agt. *De Mill*, 75 N. Y., 370.)
2. The supreme court, whether sitting in general or special term, is one court, the general term has the records of the court before it the same as the special term; and after entry of judgment upon its decision, has power to correct, amend or modify the judgment so as to give true expression to its decision. (*Salmon* agt. *Godney*, 75 N. Y., 479.)
3. The distinction between the jurisdiction of this court and of the general term of the supreme court in this particular pointed out. (*Id.*)
4. Where an appeal to this court from an order of general term involves an inquiry into the power of that court over its own records, to correct them so that they may express the purpose and judgment of the court, it is proper to look into the opinion of the general term, as delivered upon the ren-

dition of judgment, to learn what was its purpose. (*Id.*)

5. In an action to foreclose a mortgage, A. & G. were made parties defendant; their interests were the same, G. claiming as grantee of A. They put in separate answers; the litigation was upon the answer of A. Plaintiff obtained judgment; A. appealed, G. did not. The minutes of the decision of the general term were as follows: "Judgment reversed, new trial granted, costs to appellant to abide the event." An order was thereupon entered reversing the judgment as to A. only, and directing a new trial as to her. It appeared by the opinion of the general term to have been its intention to reopen the whole case and to send it back for a new trial as to all the parties interested. Plaintiff, without notice to G., discontinued as to A. On motion of G. the general term modified its order so as to reverse the judgment *in toto* and to grant a new trial both as to G. & A.:

Held, that the general term had power to so modify; and that upon appeal to this court from the order directing the modification, the question as to the power of the general term to reverse a judgment against a party who had not appealed was not presented, as its judgment was not up for review; that the question could only be presented by appeal from the order of reversal. (*Id.*)

6. Where in an order of general term, reversing a judgment entered upon a decision of the court on trial without a jury, it is not stated that the reversal was upon questions of fact, the reversal to be sustained in this court must be justified by some error of law, the opinion cannot be looked to to ascertain the ground of the reversal; if upon the facts, it must appear in the body of the order (*new Code*, sec. 1838). (*Van Tassel* agt. *Wood*, 76 N. Y., 614.)

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GRANTOR AND GRANTEE.

1. An oral agreement, made contemporaneous with the delivery of a deed of real estate, as between the parties, that the grantor would take a reconveyance of the property and release his grantee from covenants in the deed, should be clear in respect to its terms, and as to the contingencies upon which a reconveyance could be justly insisted upon, and should be made and carried out in good faith. (*Fleischauer* agt. *Dooliner*, ante, 190.)
2. Where the grantee of the premises acknowledged his liability under the covenant in his deed to pay a mortgage upon the land, by paying to the mortgagee a part of the principal, and obtaining an extension of time to pay the residue, without the consent of the mortgagor, by which the mortgagor was released, and by thereafter paying interest on the balance due to the mortgagee and his assigns, and promises to pay the balance without reservation:
Held, that he could not thereafter obtain from his original grantor, under an alleged antecedent agreement, a valid release from his covenant to pay the mortgage. (*Id.*)
3. *Develin* agt. *Murphy* (56 *How. P. R.*, 326) distinguished. (*Id.*)

GUARDIAN.

1. The guardian of an infant has authority to rent during the infant's minority, but no longer. The guardian has no interest in the lands, nothing but a naked authority. His control is limited to the rents and profits, and that ceases at the ward's majority. (*The People ex rel. Hannigan* agt. *Ingersoll*, ante, 351.)
2. Where the guardian lets for a term beyond the ward's infancy,

and the ward on coming of age affirms the letting, he may, upon alleging the facts, sustain any proper action or proceeding thereon (*Id.*)

3. The conventional relation of landlord between the ward and the tenant exists in such a case, in the sense contemplated by the authorities and the grantee of the ward after his majority, as assignee of the landlord, is entitled to the like remedies. (*Id.*)

GUARDIAN'S BOND.

1. When a pleading is demurred to, the pleading to which it professes to be an answer, may be attacked, and if insufficient to constitute an answer, judgment may be directed accordingly. (*Girvin* agt. *Hickman and another*, ante 244.)
2. Where, on the appointment of a guardian to an infant by the surrogate, a bond with sureties is taken, pursuant to the statute, for the faithful performance of the guardianship, and to render an account, &c., an action cannot be maintained upon the bond of the guardian, until the liability of the guardian be made to appear by an actual accounting outside of judicial proceedings, or as the result of such proceedings. (*Id.*)
3. But where the bond of the guardian is so full and specific, that the rights of the parties can be determined by it alone, without resort to facts *aliunde*, it is not necessary to allege or prove an accounting by the guardian before holding the surety liable upon the bond. (*Id.*)

HABEAS CORPUS.

1. The provision of the *habeas corpus* act (3 *R. S.*, p. 584, sec. 23 [*Edmond's ed.*]), excluding from its benefits persons committed or de-

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tained by virtue of the judgment or decree of a "competent tribunal," only applies where the tribunal had jurisdiction under some circumstances. (*The People ex rel. Cowley agt. Bowe, ante, 398.*)

2. The prohibition contained in said act (§ R. S., 568, sec. 42), forbidding an inquiry upon return to the writ into "the legality and justice of any process, judgment, decree or execution," specified in the provision above referred to, does not take from the court or officer having jurisdiction of the writ the power, or relieve from the duty of determining whether the judgment or process emanated from a court of competent jurisdiction, and whether the court had the power to give the judgment or issue the process. (*Id.*)

3. Where a writ of *habeas corpus* has been issued, under the provision of the nineteenth section of article 2 of title 6 of chapter 2 of part 4 of the Revised Statutes, there can be no doubt of the power of the court or officer after issuing such writ in a proper case to grant a stay of proceedings, and, also, admit a prisoner to bail. (*Id.*)

4. The application is addressed, however, to the sound discretion of the court. It is not the right of the prisoner, after conviction, to be let to bail, nor does the bare possibility that an error may have been committed entitle a prisoner to be bailed. (*Id.*)

5. After indictment, trial and conviction, an application should be entertained to admit to bail only in cases of great question and difficulty. (*Id.*)

HUSBAND AND WIFE.

1. A wife may contract with her husband in her business, and may enter into a valid partnership agreement with him under the

laws of this state. Such being the fact the husband may lawfully use as the firm name "J. Zimmermann & Co.;" and the term "Co." legally representing the wife does not offend the provisions of the act of 1833 (*chap. 281*), providing that where the designation "& Co." is used it shall represent an actual partner. (*Zimmermann agt. Erhard and Dodge, ante, 11.*)

2. A husband may maintain an action against his wife for taking and converting his property. (*Bordell agt. Bordell, ante, 102.*)

INFANT.

1. The guardian of an infant has authority to rent during the infant's minority, but no longer. The guardian has no interest in the lands, nothing but a naked authority. His control is limited to the rents and profits, and that ceases at the ward's majority. (*The People ex rel. Hannigan agt. Ingersoll, ante, 351.*)

2. Where the guardian lets for a term beyond the ward's infancy, and the ward coming of age affirms the letting, he may, upon alleging the facts, sustain any proper action or proceeding thereon. (*Id.*)

3. The conventional relation of landlord between the ward and the tenant exists in such a case, in the sense contemplated by the authorities and the grantee of the ward after his majority, as assignee of the landlord, is entitled to the like remedies. (*Id.*)

INJUNCTION.

1. Where the statutes provided that "all real and personal estate liable to taxation be estimated and assessed by the assessor at its full and true value, as they would ap-

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praise the same in payment of a just debt due from a solvent debtor," and when the assessors had completed their roll they were required to make an oath which contained this clause: "We have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the *full and true* value thereof and at which they would appraise the same in payment of a just debt due from a solvent debtor," instead of which the oath of the assessors, appended to the assessment roll, read: "We have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the *fair proportionate value* thereof and at which, in the *same ratio*, they would appraise the same in payment of a just debt due from a solvent debtor:"

Held, that such a departure from the statute vitiates the entire assessment, and where a county treasurer had, under the provisions of the statute, advertised for sale the lands of the plaintiff for an unpaid tax, he is entitled to the preventive remedy of an injunction to restrain the sale of the same. (*Beach* agt. *Hoyes*, ante, 17.)

2. Where a deed, given by a public officer, is *prima facie* evidence of title, a party should have a preventive remedy, because there is then, if such deed is given an apparent cloud resting upon the title of the owner, which extrinsic evidence only can remove. (*Id.*)
3. Where, as in this case, the treasurer's deed is, by law, made "presumptive evidence" that all the statutory provisions have been complied with, and if the plaintiff's property is sold and conveyance executed, the title in the purchaser will be, apparently and presumptively, complete, and can only be attacked and overthrown by affirmative evidence given by the plaintiff, the court is author-

ized to intervene by injunction and restrain the sale. (*Id.*)

4. In an action for a dissolution of a copartnership, it is almost a matter of course to grant an injunction and appoint a receiver. (*McEnroe* agt. *Decker*, ante, 250.)
5. In order to punish for a violation of an injunction, the order should clearly embrace the act complained of. (*German Savings Bank* agt. *Habel et al.*, ante, 336.)
6. Where an injunction was obtained restraining the prosecution of a certain action in the marine court, or any steps to recover the \$400 on deposit claimed therein: *Held*, not to enjoin the plaintiff in the marine court action from collecting certain costs awarded to it by that court prior to the injunction. (*Id.*)
7. Where, after a sale in foreclosure, but before its confirmation, the mortgagor, who remains in possession, attempts to remove from the premises machinery, claimed by the purchaser to constitute a part of the realty, an injunction restraining him from so doing may properly be issued under section 604 of the Code of Civil Procedure. (*Mut. Life Ins. Co.* agt. *Nat. Bank of Newburgh*, 18 *Hun*, 371.)
8. Plaintiff and the defendant, the village of Athens, each claimed to have the exclusive right to run a ferry between the city of Hudson and the village of Athens. In this action, brought by the plaintiff to restrain the defendant from running the said ferry, the complaint alleged that the defendant had diverted business from the plaintiff, to his great loss and damage, but gave no special details thereof. The defendant alleged that no material or irreparable damage was being done to the plaintiff, and that the defendant was abundantly responsible

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for any probable sum that plaintiff could recover:

Held, that the action was not one in which an injunction *pendente lite* should be granted. (*Power* agt. *Village of Athens*, 19 *Hun*, 165.)

9. An appeal from an order granting a temporary injunction does not supersede or authorize the defendants to disobey it. (*Id.*)

10. Where, however, defendants, in disobeying the injunction, act under the advice of counsel that it is superseded by an appeal taken therefrom, the fine imposed should not exceed the actual damage sustained by the plaintiff, together with his costs and expenses to be taxed under section 3 of chapter 270 of 1854. (*Id.*)

11. No counsel fee or extra allowance can be granted as part of such costs and expenses. (*Id.*)

12. Where, in an action in which a preliminary injunction was issued, judgment was rendered in favor of defendant, and plaintiff duly appealed therefrom, giving the proper undertaking:

Held, that defendant was not entitled, pending the appeal, to an order to assess his damages by reason of the injunction; as there was no final decision that plaintiff was not entitled thereto (*old Code*, sec. 222; *new Code*, sec. 620). (*Musgrave* agt. *Sherwood*, 76 *N. Y.*, 194.)

13. An order of reference to ascertain the damages sustained by defendant, by reason of an injunction, recoverable upon an undertaking given under the Code of Procedure (*old Code*, sec. 222), cannot be granted until it has been determined by judgment or other decision of the court that plaintiff was not entitled to the injunction; it is not sufficient that this appears by the facts developed upon the trial. (*Benedict* agt. *Benedict*, 76 *N. Y.*, 600.)

14. In an action to enforce specific performance of a parol agreement made by defendant to reconvey certain real estate conveyed by plaintiff to him, for which he had not paid, two preliminary injunctions were granted. The referee found the agreement void, but that plaintiff had a lien for the purchase-money and directed a sale thereof. In neither the report nor the judgment entered thereon was any reference made to the injunctions:

Held, that an order of reference to assess defendant's damages by reason of the injunctions was improperly granted, as it had not been decided by the court that plaintiff was not entitled thereto. (*Id.*)

15. *It seems*, that defendant might have moved, before the entry of judgment, that a clause be inserted therein to the effect that plaintiff was not entitled to the injunctions, or he could have moved after judgment, upon the findings of the referee, for an order setting aside the injunctions. (*Id.*)

INSURANCE COMPANY.

1. The general rule of law is that where a statute requires something to be done, and there is no specification of the time of performance, the duty required becomes a present one to be immediately performed. (*Attorney-General* agt. *North American Insurance Company*, *ante*, 197.)
2. Accordingly, *held*, that a receiver of an insolvent insurance company, appointed pursuant to chapter 903 of the Laws of 1869, when the securities of such company are converted into money, is entitled to the immediate possession of the same; and the superintendent of insurance cannot retain the moneys until the receiver is ready to distribute, but

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must pay them over to the receiver at once. (*Id.*)

INSURANCE (LIFE).

1. An endowment policy on the husband's life, payable on a day certain, or previous to that time, if the husband should die before said date, to his wife, her executors, administrators or assigns, although the premiums be paid by the husband, should be regarded as a life policy, to all intents and purposes, during its continuance, and, therefore, *non-assignable* (*Affirming S. C., 57 How., 886.*) (*Brummer agt. Cohn, ante, 389.*)
2. It is not necessary that the policy should refer, in terms, to the act of 1840 (*chap. 277*), or to the acts amendatory thereof, nor that the policy should contain provisions for the benefit of the children in case the wife should not survive her husband. (*Id.*)

INTEREST.

1. Interest is not recoverable upon an unliquidated demand for services performed for the testator, where there was no price or time of payment stipulated between the parties, or to be inferred from the facts, and where there is no proof of any usage on the subject. (*Purcell agt. Fry, ante, 317.*)

JAIL LIBERTIES.

1. In an action for divorce, where the defendant has been committed to jail for his failure and refusal to pay money to enable the plaintiff, who is his wife, to prosecute the action against him for divorce and for her support during its pendency, he is not entitled to the jail liberties. (*Allen agt. Allen, ante, 381.*)

2. The precept authorized by 8 Revised Statutes (*6th ed., 839, sec. 4*), is to be for the confinement of the delinquent in prison, which would not be executed by allowing him to go at large over the entire county, under a bond binding him not to transcend such limits. (*Id.*)

JOINDER.

1. A cause of action, arising out of a breach of contract on the sale of real estate, cannot be united in the same complaint with a cause of action arising from the wrongful conversion of personal property; nor can a cause of action for the latter be united with a claim for an *accounting* between principal and agent, or banker and his customer, with regard to dealings in money. (*McDonald agt. Kountze, ante, 152.*)
2. The provision of the Code (*old Code, sec. 167*), authorizing the joinder of causes of action, legal and equitable, by implication prohibits the union of a cause of action for the enforcement of a lien with one for the collection of a debt, except in the case of a mortgage secured by bond or other obligation of the mortgagor or a third person. (*Burroughs agt. Testeean, 75 N. Y., 567.*)

JUDGE'S CHARGE.

1. An objection as follows: "I desire to except to your honor's statement to the jury of evidence, or supposed evidence, connected with the accident or causing it," is too general and vague to be available as a ground of error. (*Minick agt. City of Troy, 19 Hun, 268.*)

JUDGE AND JURY.

1. This was an action brought by the plaintiff to recover the dam-

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ages sustained by him, by reason of his falling through an open hatchway on the defendant's premises. After the jury had retired, and in the absence of counsel, the jury sent to the judge a communication asking if plaintiff had been paid his salary while laid up, to which the judge replied that there was no evidence upon that subject, and that if it was paid it was a mere gratuity. Subsequently the jury being unable to agree came into court, and it was claimed that plaintiff's counsel was then informed of what had taken place, and made no objection. The jury then retired and brought in a verdict for plaintiff for fifty dollars.

On a motion by the plaintiff's counsel to set aside the verdict, on the ground of such communication having been made, *held*, that if the plaintiff knew of it, and made no objection to the jury's retiring for the second time, he thereby waived the irregularity. (*Mahoney agt. Decker*, 18 Hun, 865.)

2. That, as in no event could he have been prejudiced by the communication, it furnished no ground for granting a new trial. (*Id.*)

JUDGMENT.

1. A judgment rendered by a court having power lawfully conferred to deal with the general subject involved in the action having jurisdiction of the parties, although against the fact or without the facts to sustain it, is not void as rendered without jurisdiction, and cannot be questioned collaterally. (*Jordan agt. Van Epps*, ante, 338.)
2. A purchaser under a sale in partition is protected against all irregularities in the judgment, or in the proceedings upon which it was founded, which do not affect the jurisdiction of the court over

the subject-matter or the parties. (*Id.*)

3. This action was brought against the defendants, Ezra Jones, Burrall Spencer, Samuel M. Spencer and Jarvis Lord, as joint payees and indorsers of a promissory note, discounted by the plaintiff. The summons and complaint were personally served on Jones, and on Burrall Spencer and Samuel M. Spencer on May 7, 1878, and on Lord sometime before May 29, 1879. Samuel M. Spencer served an answer alleging that his indorsement on the note was forged by Burrall Spencer. On May 29, 1878, judgment by default was entered against Jones and Burrall Spencer. The issue raised by Samuel M. Spencer's answer is still pending. Burrall Spencer had notice of the entry of the judgment against him on June 7, 1878, and subsequently used the judgment roll for the purpose of establishing a defense interposed by him in an action of foreclosure, to which all the parties to this action were parties. On May 9, 1879, Burrall Spencer noticed a motion to be heard May 27, 1879, to set aside the judgment against him for certain irregularities which were specified in his notice:

Held, that the court below, in its discretion, properly denied the motion, and that an order to that effect should be affirmed. (*National Bank agt. Spencer*, 19 Hun, 569.)

4. In 1877 the plaintiffs sued Silliman & Co. for \$12,000 upon various drafts and notes made by that firm, among which was a note for \$2,500, made by that firm to the order of, and indorsed by, the defendant Marks, upon which plaintiffs claimed there had been paid but \$123. Silliman & Co. answered, denying that any thing was due to the plaintiff on the note, and averring that it was made and given to the plaintiffs as collateral to claims, which had

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subsequently been paid. The firm also offered to allow judgment to be taken against them, under section 788 of the Code of Civil Procedure, for the amount claimed in the complaint, after deducting that note, which offer was accepted by the plaintiff, and judgment was entered accordingly. Subsequently the plaintiffs brought this action upon the same note against the defendant Marks, who had indorsed it:

Held, that this action was barred by the judgment entered in the former action. (*Robinson* agt. *Marks*, 19 *Hun*, 325.)

5. In an action for limited divorce, brought by the wife against the husband, the court, after it has denied the principal relief sought, on the ground that the evidence failed to show facts to establish any of the causes for which a separation can be adjudged, has no power to give judgment awarding the custody of the children of the marriage to the plaintiff and making provision for their maintenance out of the property of the husband; upon failure of the plaintiff to make out a case for a divorce the defendant is entitled to judgment dismissing the complaint. (*Davis* agt. *Davis*, 75 *N. Y.*, 221.)

6. Under the provision of the Code of Civil Procedure (*new Code*, sec. 1228), declaring that judgments on the decision of the court may be entered "after the expiration of four days from the filing of the decision, * * * and the service upon the attorney of the adverse party of a copy thereof, but not before," four full calendar days must elapse after the filing of a decision and notice thereof before judgment can be properly entered. (*Martin* agt. *Martin*, 75 *N. Y.*, 240.)

7. The rule of interpretation which, in computing time, excludes the first and includes the last day has no application where, as here, the

provision is clear and explicit. (*Id.*)

8. Nor has the provision of said Code (sec. 788), which declares a like rule for computing the time within which an act in an action or special proceeding is required to be done, any application, 1st. because it refers to the preceding section (sec. 787); 2d. It excepts cases where the law makes other provision; 3d. It relates to the time within which an act is required to be done, not to a period after the expiration of a specified time; 4th. The two sections have no connection, and this one was not designed to limit the operations of the other. (*Id.*)

9. This action was brought against all the members of a board of education of a union free school district jointly as trustees, charging them as public officers, not as individuals, with neglect in not keeping the school-house in repair, in consequence whereof plaintiff was injured. It appeared upon the trial that the board had an arrangement with F., one of the defendants, that when any small repairs were needed he was to make them, whether upon order or notice first given, or upon his own motion did not distinctly appear, and it did not appear that the question of his individual liability, distinct from that of the other defendants was presented to the trial court. The judgment was against all of the defendants jointly:

Held, error; and that it could not be sustained against F. (*Bassett* agt. *Fish*, 75 *N. Y.*, 308.)

10. A judgment for plaintiff will not be reversed on appeal because of an omission to aver in the complaint or to prove upon the trial a fact essential to the plaintiff's case, unless the defect was pointed out and is reached by a proper exception taken on the trial. (*Thayer* agt. *Marr*, 75 *N. Y.*, 340.)

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11. The docket of a justice of the peace showed the service of summons, the appearance of the parties, the issue, a motion for discontinuance made by defendant on the ground that the accounts between the parties exceeded \$400, the granting of the motion on that ground, and the items of costs; it also recited that it satisfactorily appeared from the proof offered, that the accounts of the parties exceeded said sum; it did not, in terms, award judgment of discontinuance with costs against plaintiff:
Held, that the docket contained all the particulars necessary to constitute a valid judgment of discontinuance for want of jurisdiction. (*Bradner agt. Howard*, 75 N. Y., 417.)
12. A valid judgment *in personam* cannot be obtained against a non-resident of the state who is not personally served with process and does not appear in the action. (*Bartlett agt. Spicer*, 75 N. Y., 528.)
13. A state cannot authorize such a judgment, which will bind property not within the state at the time and not proceeded against *in rem*, in satisfaction of the claim. (*Id.*)
14. In an action brought by a material-man, under the mechanic's lien law of 1862, for the counties of Kings and Queens (*chap. 478 Laws of 1862*), to foreclose an alleged lien for the value of materials furnished to a contractor, in which action the contractor is joined as defendant, and a personal judgment is demanded against him, such judgment cannot be rendered where the plaintiff fails to establish his lien. The action is in the nature of a proceeding *in rem*, and, as incident thereto, a personal judgment is authorized "in addition to the judgment" provided for against the owner of the premises; having failed in obtaining that relief, plaintiff fails altogether. (*Burroughs agt. Thelevan*, 75 N. Y., 587.)
15. The fact that said act authorizes the enforcement of a lien "by a civil action in a court of record" governed by "the rules and practice in ordinary actions" (*sec. 2*) does not authorize a personal judgment in such a case. (*Id.*)
16. The objection that a judgment in an action against an executor as such is not in proper form, in that it should be *de bonis testatoris*, cannot be taken for the first time upon appeal; if the judgment is erroneous in this respect defendant should move in the court in which it was rendered to have it amended. (*De Lavallette agt. Wendt*, 75 N. Y., 579.)
17. *It seems*, that where a debtor, against whom actions have been commenced by different creditors, serves an offer of compromise under the Code (*old Code, sec. 335; new Code, sec. 738*) in the action last commenced, and thus enables the plaintiff therein, by accepting the same, to perfect his judgment in advance of the creditor who first brought suit, and to obtain a preference in the payment of his debt, this is not such a fraud as will authorize the setting aside of the judgment so obtained; the giving of a preference to one creditor over another is not unlawful. (*Beards agt. Wheeler*, 76 N. Y., 313.)
18. Where, in an action against partners upon a partnership obligation, separate judgments are entered against each of the defendants, instead of a joint judgment against all, this is an irregularity merely; and the court has no power to set aside the judgments on motion, unless motion is made within one year after their rendition (2 R. S., 359, *sec. 2*). (*Judd L. and S. O. Co. agt. Hubbell*, 76 N. Y., 543.)

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19. A final judgment for one of several defendants, upon demurrer to the complaint, is, so far as the causes assigned for demurrer are sustained by the judgment, as complete an adjudication in his favor as would be a judgment of nonsuit on trial; and plaintiff cannot nullify its effect by obtaining an *ex parte* order discontinuing the action as to such defendant. (*Stanton* agt. *King*, 76 N. Y., 585.)

20. In an action to charge a trust estate, in the hands of trustees, with a claim for services rendered by plaintiff to the trustees, a *cestui que trust* was made a party defendant and final judgment was perfected in her favor upon demurrer to the complaint. Plaintiff thereupon obtained an *ex parte* order, striking out said defendant as a party:

Held, that the effect of the judgment upon the demurrer, was that said defendant's share or interest in the trust estate, in the hands of the trustee, could not be bound for, or affected by plaintiff's claim, but to enable her to avail herself of the benefits of the adjudication, she must remain a party; that the order striking her from the case in effect nullified the judgment, and so was error. (*Id.*)

JURISDICTION.

1. The last clause of section 5242, United States Revised Statutes, forbidding an attachment, injunction or execution to be issued against a national bank before final judgment in any proceeding in a state court, applies only to such banks as have committed or are contemplating an act of insolvency. (*Robinson* agt. *National Bank of New Berne*, ante, 806.)

2. An attachment can, therefore, issue against a national bank, except under the above circumstances, from a state court, as

provided by the Code of Civil Procedure. (*Id.*)

See SURREGATE.

Matter of the Estate of Cohen, ante, 496.

See RECEIVER.

Killmer agt. *Hobart and another*, ante, 452.

3. The supreme court of this state has jurisdiction of an action, brought therein by an assignee in bankruptcy, to recover a debt paid to the defendant by the bankrupt within four months of the filing of the petition in bankruptcy. (*Tyler* agt. *McCollum*, 19 Hun, 622.)

4. In proceedings under the provision of the act of 1860 (sec. 4, chap. 848, *Laws of 1860*), in relation to assignments for the benefit of creditors, which gives to the county judge power, upon the petition of any creditor, to compel an assignee to account, *held*, that a petition duly verified, averring the petitioner to be a creditor, was sufficient to give the county judge jurisdiction, and that, although the truth of this allegation was denied by the assignee in his answering affidavit, this did not oust the judge of jurisdiction, or compel the petitioner to establish, by a suit or proceeding, *alunde*, the validity of his claim. (*In re Farnam*, 76 N. Y., 187.)

5. Also, *held*, that it was not necessary for the petitioner to profess in his petition that he moved in behalf of the other creditors. (*Id.*)

6. The petition averred that the assignment was made and filed, and inferentially, that it was delivered; also that the assignee entered upon the execution of the trusts, took possession of the trust estate, and sold and disposed of a large amount thereof. The affidavit of the assignee admitted the execu-

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tion of the assignment, and alleged substantially that he did not accept the trust, but took the property by appointment of the creditors:

Held, that this averment did not oust the judge of jurisdiction, but simply raised an issue for his determination. (*Id.*)

7. The supreme court, whether sitting in general or special term, is one court, the general term has the records of the court before it the same as the special term; and, after entry of judgment upon its decision, has power to correct, amend or modify the judgment so as to give true expression to its decision. (*Salmon* agt. *Gedney*, 75 N. Y., 479.)
8. The distinction between the jurisdiction of this court and of the general term of the supreme court in this particular pointed out. (*Id.*)
9. The supreme court of this state has not jurisdiction of an action upon a stipulation entered into in a proceeding in admiralty, instituted to obtain possession of a vessel for the purpose of prosecuting a particular voyage. (*Bartlett* agt. *Spicer*, 75 N. Y., 528.)
10. The stipulation is but an incident to the proceeding of which, as it is a possessory action *in rem*, the United States district court has exclusive jurisdiction; and the stipulation can only be enforced by and in accordance with the practice of that court. (*Id.*)
11. Under the provision of the charter of the village of Port Jervis (*sec. 40, chap. 370, Laws of 1873*), giving to the police justice of said village the jurisdiction, powers and authority of the justices of the peace of the town in which the village is situated, with "jurisdiction to hear and determine all cases arising under the charter, by-laws or ordinances," the jurisdiction in the class of cases last

specified is to be exercised in the same manner as in cases before justices of the peace. (*Peo. ex rel. Dargin* agt. *Coz*, 76 N. Y., 47.)

12. In an action, therefore, for a violation of an ordinance of said village, *held*, that defendant was entitled to demand and have a jury, as on trial before a justice of the peace. (*Id.*)
13. Where, upon presentation to a clerk in the office of a surrogate of a petition asking for the appointment of an administrator of the estate of M., who was, in fact, then living, the clerk filled up a blank for letters of administration signed and left with him by the surrogate, and attached thereto the surrogate's seal, the latter never having acted upon and having had no knowledge of the petition, *held*, that the judicial powers of the surrogate could not be delegated; that the letters were absolutely void, and were no protection to one who, upon presentation thereof, in good faith and relying upon them, paid to the person named as administrator a sum due M. (*Roderigas* agt. *E. R. Segs. Bk.*, 76 N. Y., 316.)
14. The petition alleged the death of M. upon the best of the knowledge, information and belief of the petitioner; there was no other proof of death. *Held*, that this was not due proof of the death such as would give the surrogate jurisdiction. (*Id.*)
15. The court of common pleas of the city and county of New York has no jurisdiction to entertain an appeal from an order of the marine court, except it be an order granting a new trial (*old Code, secs. 34, 358, 354; sec. 9, Chap. 545, Laws of 1874; sec. 43, chap. 479, Laws of 1875*). (*Bamberg* agt. *Stern*, 76 N. Y., 555.)
16. This court has no power to amend a record of the supreme court;

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any amendment must be sought in that court. (*Kenyon* agt. *N. Y. C. and H. R. R. Co.*, 76 *N. Y.*, 607.)

JUROR.

1. When a person is competent to sit as a juror in a criminal case under chapter 475 of 1872, although he has read an account of the crime in the newspapers and has formed an opinion as to the prisoner's guilt therefrom, considered. (*Pender* agt. *People*, 18 *Hun*, 560.)

JURY.

1. The proceedings by which a jury is to be obtained in a justice's court are purely statutory and should be strictly complied with, otherwise the judgment rendered cannot be sustained. (*Becker* agt. *Sitterly*, ante, 38.)
2. The justice is limited by the statute to a certain course of proceedings; and unless those proceedings are adhered to, or waived by the party who has a right to insist on them, the judgment is irregular and void. (*Id.*)
3. A venire for a jury issued by a justice of the peace to the defendant at his request out of court, and in the absence of the plaintiff and without giving him notice, is irregular, and for such irregularity the judgment will be reversed. (*Id.*)
4. Where it appeared that after the twelve names of the jurors summoned and present had been folded and put into a hat the justice drew out all twelve names at the defendant's request; then he called the twelve names and the jurors all answered, whereupon plaintiff's counsel requested the justice to put all the names back again and draw out six to make the jury, which request the justice refused:

Held, that the refusal of the justice to deposit the twelve names in the hat again and draw out six, one after another (as required by the statute), to compose the jury, when requested by plaintiff's counsel so to do, was a fatal error and one for which the judgment will be reversed. (*Id.*)

5. Upon the trial of the plaintiff in error for murder, the court having ordered additional jurors to be summoned, the clerk brought into court the box containing the names of the trial jurors for the county, and the box containing the names of those for the town, but not the one containing the names of those who had already served. The jurors having been duly summoned, the prisoner's counsel interposed a challenge to the array, on the ground that all the boxes were not brought into court as required by section 1059 of the Code of Civil Procedure. The court having sustained the challenge the prisoner's counsel withdrew it:

Held, that by withdrawing the challenge the prisoner waived any informality in the drawing of the jury, and was concluded from objecting thereto on appeal.

Semble, that as it did not appear that the names in the county jurors' box were exhausted, the failure of the clerk to bring into court the third box did not affect the validity of the drawing. (*Pierson* agt. *People*, 18 *Hun*, 259.)

5. A juror, upon the trial of a challenge to the favor, testified that he had read of the case in the papers and formed a decided opinion, which it would require evidence to remove, and that he would enter the jury box with it still existing, and that it would require evidence to dislodge it; that he generally believed what he read in the papers, if it sounded reasonable, until contradicted; that if accepted as a juror he did not think he would permit what

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he had read to affect his judgment; that he verily believed he could decide the case according to the evidence produced in court, and that alone; that his opinion was based upon the truth of what he had read; that he did not know whether the account was true or not; that there was nothing to keep the opinion in his mind when the trial had begun and evidence been introduced; that he believed the prisoner to be guilty from the statement, in a general way. The court, from the answers which the juror made, and from his appearance before it, overruled the challenge:

Held, no error. (*Cox* agt. *People*, 19 *Hun*, 430.)

7. The counsel for the prisoner interposed an unverified written challenge to the array, in which he referred to each step necessary to the selecting and drawing of the jury, and alleged, substantially, that it had not been done in the manner and form required by the statute. An oral demurrer, interposed by the district attorney, was sustained by the court, in part, at least, because the challenge was unverified. On the following day, and after three jurors had been drawn and examined, but before any had been sworn, the court, of its own motion, offered to allow the prisoner's counsel to renew his special plea, leaving it unverified, and the district attorney offered to traverse it and consented to proceed at once to the trial of the issue thus joined, and to allow the jurors drawn to stand aside; the court stating that it was done so that there might be no possible prejudice to the prisoner. To this proposition the counsel for the prisoner refused to consent, and the trial proceeded.

On a writ of error to review the conviction, *held*, that this offer of the court and district attorney took away the right of the prisoner to insist that he was injured, in fact, by the action of the court,

and compelled him to stand upon errors of law, *strictissimi juris*.

That the mere unaccepted proposition did not have the effect of curing any error that might have been committed in sustaining the demurrer.

That the fact that the challenge was unverified was not a ground of demurrer. (*Id.*)

8. That the demurrer was, however, properly sustained, as the challenge was bad because of the alternative character of its allegations; they impliedly admitted that every thing, not done in the particular mode required by the statute, might nevertheless have been done in some other way, which the law to prevent a failure of justice would accept as sufficient. (*Id.*)

9. The plaintiff's intestate, a deaf-mute, on approaching the defendant's tracks, at a crossing in a public street, in the city of Rochester, at about midnight, found a freight train passing; he waited until it had passed, stepped upon the track to cross, and was struck and killed by an engine following the freight train, at a distance of about fifty feet. The night was very dark, and the engine was running backwards, with no light upon its tender, at the rate of about twenty miles an hour, though it was prohibited by a city ordinance from running at a greater rate than eight miles an hour. The evidence tended to establish the fact that a flagman was kept at the crossing, but failed to show he was there at the time of the accident.

Held, that the question of defendant's negligence and of plaintiff's contributory negligence should have been submitted to the jury, and that it was error to direct a nonsuit. (*Waldels* agt. *N. Y. C. and H. R. R. R. Co.*, 19 *Hun*, 69.)

10. Irregularities in reference to the

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working of the machinery, provided by statute for procuring jurors, offer no ground for reversing a conviction, unless it appears that the defendant was in fact injured or prejudiced thereby. (*Cox* agt. *People*, 19 *Hun*, 480.)

11. The guilt of a person accused of a crime is to be determined in a common law court by a jury, and the people as well as the accused have the right to have it so determined. (*Davis* agt. *Am. Soc.*, etc., 75 *N. Y.*, 362.)

12. An order denying a motion to set aside a verdict and for a new trial, because of the alleged misconduct of a juror, is not reviewable here. The provisions of the new Code as to the jurisdiction of this court in such a case are not materially different from the old. (*Gale* agt. *N. Y. C. and H. R. R. Co.*, 76 *N. Y.*, 594.)

JURY TRIAL.

1. An action to restrain the continuance of a nuisance, and to recover the damages occasioned by it, is triable by a jury, and cannot be tried by the court unless the parties consent thereto; especially is this so where the court refuses to restrain the further continuance of the alleged nuisance and only maintains the action for the purpose of giving the plaintiff damages. (*Dorr* agt. *Danville Gas Light Co.*, 18 *Hun*, 274.)

JUSTICES' COURTS.

1. The proceedings by which a jury is to be obtained in a justice's court are purely statutory and should be strictly complied with, otherwise the judgment rendered cannot be sustained. (*Becker* agt. *Sitterly*, ante, 88.)

2. The justice is limited by the stat-

ute to a certain course of proceedings; and unless those proceedings are adhered to, or waived by the party who has a right to insist on them, the judgment is irregular and void. (*Id.*)

3. A venire for a jury issued by a justice of the peace to the defendant at his request out of court, and in the absence of the plaintiff and without giving him notice, is irregular, and for such irregularity the judgment will be reversed. (*Id.*)

4. Where it appeared that after the twelve names of the jurors summoned and present had been folded and put into a hat the justice drew out all twelve names at the defendant's request; then he called the twelve names and the jurors all answered, whereupon plaintiff's counsel requested the justice to put all the names back again and draw out six to make the jury, which request the justice refused:

Held, that the refusal of the justice to deposit the twelve names in the hat again and draw out six, *one after another* (as required by the statute), to compose the jury, when requested by plaintiff's counsel so to do, was a fatal error and one for which the judgment will be reversed. (*Id.*)

5. A judgment in favor of a physician and surgeon, rendered in justice's court having jurisdiction, in an action for professional services, in which the defendant appeared and put in an answer, but afterwards withdrew it and did not contest plaintiff's claim, is a bar to a subsequent action by the defendant against the plaintiff for malpractice in rendering the services. (*Blair* agt. *Bartlett*, 75 *N. Y.*, 150.)

6. An omission on the part of defendant to appear and plead, or an appearance and refusal to plead,

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in justice's court, is not an admission of plaintiff's demand; he must establish it by testimony the same as if issue had been joined. (*Id.*)

7. Whatever, therefore, was requisite to be proved and established as facts by plaintiff in order to obtain judgment is, so long as the judgment remains unreversed, *res adjudicata* between the parties, and conclusive upon them. (*Id.*)

8. Where a defendant in an action in a justice's court, procures a discontinuance thereof upon the ground that the accounts of the parties at issue exceed \$400, and plaintiff thereupon brings an action in the supreme court and recovers less than fifty dollars, defendant is estopped from claiming that the justice had jurisdiction, and so that he is entitled to costs; the plaintiff has a right to repose upon the decision of the justice, and it is not open for defendant, in answer to plaintiff's claim for costs, to say that such decision was erroneous; having availed himself of it he cannot question it. (*Bradner* agt. *Howard*, 75 N. Y., 417.)

9. The docket of the justice in such case showed the service of summons, the appearance of the parties, the issue, a motion for discontinuance made by defendant on the ground that the accounts between the parties exceeded \$400, the granting of the motion on that ground, and the items of costs; it also recited that it satisfactorily appeared from the proof offered that the accounts of the parties exceeded said sum; it did not, in terms, award judgment of discontinuance with costs against plaintiff:

Held, that the docket contained all the particulars necessary to constitute a valid judgment of discontinuance for want of jurisdiction. (*Id.*)

JUSTICES' JUDGMENT.

1. Section 248 of 2 Revised Statutes, 270, providing that the proceedings in any case, had before a justice of the peace, may be proved by his oath, does not authorize a judgment recovered before him to be established by his parol testimony as to the proceedings had before him, without the production of his docket; in such case the judgment can only be proved by the production and verification of the docket itself. (*Dorr* agt. *City of Troy*, 19 Hun, 223.)

LANDLORD AND TENANT.

1. At common law, the abandonment of untenable premises constituted no defense to the tenant in an action by the landlord for the rent. (*Graves* agt. *Cameron*, *ante*, 75.)

2. Where the demised premises are situated in another state, the law of that state governs the rights and liabilities of the parties, and, in the absence of a plea and proof by the defendant of some statute of the other state changing the common law rule, the courts of this state must presume that the common law governing the matter is in force in such state. (*Id.*)

3. An entirely new defense cannot be interposed at the trial by way of amendment, and a refusal by the trial justice to permit the tenant to amend upon the trial, by pleading the foreign statute, was not error. (*Id.*)

See SUMMARY PROCEEDINGS.
Armstrong et al agt. *Cummings*
and *Ingersoll*, *ante*, 331.

LEGACIES.

See WILL.
Wilde agt. *Wilde et al*, *ante*, 71.

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LEVY.

1. Property of the defendant having been levied upon under executions, issued upon judgments recovered against it by the plaintiff and another, the same was, by an order of the court, made on April 23, 1878, directed to be sold under the said executions, subject to the approval of the court. The property was sold April twenty-ninth, and was purchased by the plaintiff, at a price in excess of the amount due on all the judgments. No money was paid, but a bond was given conditioned that the purchaser would bring the money into court, or pay the same over as the court might direct. On May fourteenth the sale was approved by the court. Prior thereto and on May fourth the plaintiff recovered another judgment against the defendant, exceeding in amount the surplus which had arisen on the sale, and on that day issued an execution to the same sheriff. July 16, 1878, the appellant was appointed receiver of the defendant, and thereafter applied to have the surplus paid over to him:

Held, that this application was properly denied, and that the plaintiff was entitled to have it applied upon his judgment of May fourth. (*First Nat. Bank agt. Whitehall Trans Co.*, 18 Hun, 161.)

2. An execution having been delivered to the sheriff, he went to the office of the defendant, a lawyer, and found him out; he then went to the defendant's farm, looked over certain articles of personal property and made a minute of them; he then returned to defendant's office, and finding him still out, he looked over his library, opened the cases, handled the books and made a memorandum of them. On the next day he saw the defendant, showed him the execution and told him he had levied on the books:

Held, that the levy was sufficient as against a subsequent purchaser from the defendant. (*Dean agt. Campbell*, 19 Hun, 584.)

3. That such levy continued in force for the benefit of executions, received by the same sheriff subsequently, and up to the time that the execution under which the levy was made was paid. Except as against a purchaser in good faith the goods of the debtor are bound from the time of the delivery of the execution to the sheriff. (*Id.*)

LIBEL.

1. As applied to one in a professional character, the language that is claimed to be actionable, *per se*, must "touch him" in that profession. (*Gunning agt. Appleton*, ante, 471.)
2. Where the complaint alleged that plaintiff, for nearly forty years past, has been, and still is, a practicing dental surgeon, and was of good name, fame and credit in such profession; that the defendants maliciously published, concerning plaintiff, in their said journal, a certain article, containing many detractive misstatements, and especially the false and defamatory matter following, to wit: "The late William H. Seward, when traveling around the world, and when at Tohohama, Japan, required the services of a dentist. Upon examination, it was found that the inferior maxilla was comparatively useless for masticating purposes, there being a false joint at the seat of the original fracture, no union having taken place. This case will be remembered, from the world-wide notoriety of the circumstances attending the injury, as well as the reports, which have been universally believed, that the patient was benefited by the treatment he received for the cure of his fracture":

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Held, that the language is not defamatory on its face. It assumes to give an account of a circumstance in which many others besides plaintiff may be presumed to have had an interest. He is not therein referred to personally, or as one of a class. It is not alleged that no subsequent cure was effected, or that he was under treatment prior to the examination mentioned:

Held, also, that the allegations in the complaint, following the statement of the publication claimed to be libelous, can only be regarded as innuendoes to explain, not to extend the meaning of such publication.

Held, further, that no malice is presumable from the publication in question, and no right of action has accrued to plaintiff therefrom. (*Id.*)

3. To impute to a professional man ignorance, or want of skill, in a particular transaction, is not actionable. To be actionable, words of that character must be spoken or written of him generally. (*Id.*)
4. In an action for libel, the defendants have a right to test the actionable quality of the words by demurrer, and to that extent only is their pleading to be construed as an admission of the allegations of the complaint. (*Id.*)

MANDAMUS.

1. *Mandamus* may properly issue where a religious corporation refuses or attempts to prevent the burial of a person in a plot of ground, for which he has paid the purchase price and received a conveyance thereof from such corporation. It properly issues to compel a corporation to do that which, by law, it is required to do, especially when no other adequate remedy exists. (*The People ex rel. Coppers* agt. *Trustees of St. Patrick's Cathedral*, ante, 55.)

See ELECTION LAW.

The People ex rel. Hatzel agt. *Board of Supervisors*, ante, 141.

See INSURANCE COMPANY.

Attorney-General agt. *North American Insurance Co.*, ante, 197.

MANUFACTURING COMPANY.

1. In an action brought by a creditor of a manufacturing corporation against a trustee for a liability imposed by the fifteenth section of the act of 1848 for the filing of a false report, the complaint should show that the debt, for which the defendant is sought to be made liable, was contracted while he was a trustee. (*Anderson* agt. *Speers*, ante, 68.)

2. Where the complaint alleged that the defendant was, on the 13th day of January, 1877, and "before that date," a trustee:

Held, not to be an averment that he was such trustee, in the year 1876, when the debt was alleged to be contracted. (*Id.*)

3. The filing of a false report on successive years gives rise to a separate cause of action as to each year. (*Id.*)
4. The allegations in one cause of action cannot be supplemented by those in another and separate cause in the same complaint, unless they are connected therewith by appropriate statements. (*Id.*)
5. *Victory Webb, &c., Company* agt. *Beecher* (55 How., P. R., 193) applied.

MARRIED WOMAN.

1. Where the plaintiff, at the time she entered into the service of the testator, was a married woman, but she had separated from her husband and was supporting her-

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self, and, apparently, never received any further attention or support from her husband after her separation from him:

Held, that, under such circumstances, her earnings belonged to her, and were recoverable by her, and not by her husband. (*Pursell* agt. *Fry*, ante, 817.)

2. The statutes of 1860 and 1863, as to married women, have not altered the common-law liability of the husband for the personal torts of his wife, but when such torts are committed in the management and control of her separate property the rule is changed, and she only is liable. (*Lansing* agt. *Holdridge*, ante, 449.)

3. The wife is liable in the same manner, and to the same extent, for frauds or torts committed in the management of her property, as she is upon contracts relating to it. (*Id.*)

4. Where the wife of H. owned a house, which was insured and was occupied by N. as a tenant; the wife set fire to it in the night and it burned down, and the tenant's furniture was destroyed; H. was temporarily absent from home in a neighboring state, and was in no manner connected with her act; suit was brought by N., to recover for his damages against the wife, a daughter that was with her at the time of setting the fire, and H., the husband:

Held, that H., the husband, was not liable. That the plaintiff's damages resulted as a consequence of the tort committed by the wife in the management of her separate estate, and for these damages she may now be sued alone, and she holds her property as though "husbandless," from which to respond for the damages. (*Id.*)

MARINE COURT (CITY OF NEW YORK).

1. The court of common pleas of the city and county of New York

has no jurisdiction to entertain an appeal from an order of the marine court, except it be an order granting a new trial (*old Code*, secs. 84, 852, 854; sec. 9, chap. 545, *Laws of 1874*; sec. 48, chap. 479, *Laws of 1875*). (*Bamberg* agt. *Stern*, 76 N. Y., 555.)

2. Accordingly, *held*, that an order of the general term of the marine court, granting a perpetual stay of proceedings, was not appealable to the common pleas. (*Id.*)

MECHANIC'S LIEN.

1. In an action by a subcontractor to enforce a lien claimed to have been acquired under chapter 478 of 1862, providing a mechanic's lien law for the counties of Kings and Queens, the owner is entitled to be allowed for all payments made to the contractor, although made in advance of the terms prescribed by the contract, if made without fraud or collusion, and before notice of the filing of a lien under said act. (*Post* agt. *Campbell*, 18 Hun, 51.)

MISJOINDER.

1. A misjoinder of parties plaintiff is not a ground for the dismissal of the complaint, as to all the parties plaintiff, if either has a good cause of action. (*Elmes* agt. *Leach*, 18 Hun, 139.)
2. The objection of misjoinder of parties plaintiff should be raised by answer or demurrer. (*Id.*)

MISNOMER.

1. A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision if, either from the will itself or

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evidence *abunde*, the object of the testator's bounty can be ascertained. (*Leonard et al. agt. Davenport, ante*, 384.)

MORTGAGE.

1. K. conveyed to N. certain lands fronting on One Hundred and Twenty-first street, in the city of New York, at an agreed price. At the same time it was agreed between them that N. should erect eleven houses on said lands, and that K. should advance, from time to time, as the houses progressed, to N. certain moneys towards their erection, for which advances it was further agreed that K. should receive from it a mortgage on each of the eleven houses for one-eleventh part of the money so advanced. Afterwards, when part of the moneys so to be advanced had been paid, N. executed to K. a mortgage on the whole of said property to the amount of the advances that had then been made. This mortgage, it was agreed, should be held as security till all the advances should have been made, and till the eleven separate mortgages should be executed. Subsequently the whole of the agreed advances having been made, eight of the houses were sold by N. to various parties (among them the premises in question), on each of which, except the premises in question, the respective purchasers executed a mortgage (which was transferred to K.) for the proportionate amount advanced by K., who thereupon released his prior mortgage as to such house. N. also executed like mortgages on the remaining three houses, whereupon K., in like manner, released his lien as to those, so that the entire prior mortgage was released, except as to the house in question, and that was sought to be charged only for its proportionate amount of such advances under the first mortgage. The conveyance of the premises

in question was recorded in August, 1878. It was made subject "to two mortgages on said premises, amounting in the aggregate to the sum of \$5,000." The first of the said two mortgages was one for \$4,000, which is not in question here, and there was no other mortgage except the one in question on this house. In September following the conveyance in question, the last of the agreed advances was paid. The purchasers of the house in question claim: 1st. That the releases executed by K. of the ten other houses operated as a discharge of their house. 2d. That the receipt by him of the ten separate mortgages on the other houses, which, in the aggregate, were for a larger sum than the original mortgage, but were less by the sum which was the proportionate share of the premises in question, and which is sought to be recovered of the advances made, if the last payment made subsequent to the date of the deed to the grantees of the premises in question was deducted from the aggregate amount of said ten mortgages:

Held, that the mortgage was a valid and subsisting lien on the premises in question for the amount claimed, to wit, the proportionate amount of the advances made, deducting the amount of the last payment on account of the advances from the aggregate of the separate mortgages, and deducting the remainder from the general mortgage left the sum claimed as due. (*Kendall agt. Niebuhr, ante*, 156.)

2. The general rule that after alienation of a part of the mortgaged premises the remainder becomes primarily liable for the whole mortgage and that the portions alienated are liable only in the inverse order of alienation, and then only to the extent remaining due when the premises precedently liable have been exhausted is *fully recognised*. (*Id.*)

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3. But the rule of charging lands in the inverse order of alienation or holding a portion remaining apparently covered by a mortgage discharged in consequence of the release by a mortgagee with notice of other portions which were primarily liable is a *mere* rule in equity. The release to a subsequent purchaser is not a technical discharge of the lands previously conveyed. Neither is it an equitable release or discharge, unless upon the principles of natural equity and justice it ought thus to operate. (*Id.*)

4. A mortgagee is not bound, at his peril, to ascertain if the mortgaged premises have been aliened or mortgaged subsequent to his mortgage before releasing a part of the mortgaged premises. Recording a conveyance is not notice to him; it is notice only to *subsequent* purchasers in good faith and for a valuable consideration. (*Id.*)

5. Where a mortgagee, before releasing part of his mortgage security, employs an attorney to search the title and prepare the release and such attorney found of record certain conveyances, such knowledge is equivalent to knowledge by the mortgagee even if the attorney failed to communicate such information to his client. (*Id.*)

6. R., under his contract with N. was compellable to execute the release upon recovering the separate mortgages. The record of the mortgage covering the whole of the eleven houses was notice to the purchasers of the premises in question of a lien which, under certain circumstances, might have been enforced against this lot for its entire amount. If they had not notice of the contract between K. and N., they were put upon their inquiry in regard to it and by due diligence could have ascertained its terms. (*Id.*)

7. The contract between K. and N.

constituted an equitable mortgage and gave K. in equity an equitable lien which could be enforced against subsequent purchasers to the extent actually due under it. (*Id.*)

MORTGAGE FORECLOSURE.

1. Where three actions of foreclosure had been commenced, the defendants being the same in each, the mortgage in the first action covering fifty acres of land which, after the execution of this mortgage and the two mortgages affected by the second action, had been sold to L. D., one of the defendants; the two mortgages in the second action covered 150 acres, embracing the lands affected by the mortgage in the first action; the mortgage in the third action covered 100 acres, being part of the land affected by the mortgages in the first and second action, and excluding the portion sold to the defendant L. D.; on motion to consolidate the three actions:

Held, that the motion could not be granted for the following reasons:

First. The authorities are against it (6 *Abbott's New Cases*, 69).

Second. The proceedings are, *in rem*, against different pieces of property, and there is no reason why one parcel should bear burdens in the way of costs which belong to another.

Third. Rights of individual defendants differ, and one defendant should not bear that which belongs to another. (*Kipp agt. Delamater, ante*, 183.)

MORTGAGOR AND MORTGAGEE.

1. Where the mortgagor conveys to a third party, who assumes the mortgage, the relation of principal and surety arises between the mortgagor and his vendee, and after notice of this relation the

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- mortgagee is bound to observe it and abstain from doing any act to the prejudice of the mortgagor, or which would impair his recourse against the mortgaged premises in case he should be obliged to pay his bond and be subrogated to the mortgagee; the mortgagee in such a case, after notice, cannot, with impunity, release the land or extend the time of payment, or do any other act to the prejudice of the mortgagor, and the prohibited acts are determined by the law of principal and surety. (*Marshall and Miller agt. Davis and others, ante, 281.*)
2. But the actual relation of debtor and creditor between the mortgagor and mortgagee cannot be destroyed by any act of the mortgagor alone, where the mortgage is given to secure the bond of the mortgagor. (*Id.*)
 3. In cases like the present the relation of creditor and principal debtor is so affected that the mortgagee is bound, after notice of the equitable rights of the mortgagor, as between himself and vendee, to respect them and do no act to their prejudice, and when he forecloses the equities of the mortgagor will be protected in the order of sale. But the mortgagee may sue upon the bond in the first instance, notwithstanding the transfer of the land. (*Id.*)
 4. Where a vendee of mortgaged premises has assumed the payment of the mortgage, the mortgagor cannot compel his creditor to foreclose when there is no good reason why he did not pay his bond according to his agreement and take an assignment of the bond and mortgage and proceed against the land and the subsequent grantees thereof for his indemnity. He can also proceed in equity to compel such grantees, as to whom he stood in the situation of a mere surety, to discharge the debt for his protection. (*Id.*)
 5. In the absence of any notice of change in the position of the mortgagor, and of any request to foreclose, a mortgagee out of possession may rely upon the personal liability of his debtor, and is not bound to look after or protect the mortgaged premises; and if he forecloses the mortgage, the debtor is entitled to credit only for the net proceeds of sale realized by his creditor, after the deduction of all liens for taxes, &c., and remains liable for the deficiency. (*Id.*)

MOTIONS AND ORDERS.

1. There is no absolute right to a notice of eight days on enumerated motions. A shorter notice may be prescribed by a judge or court, under section 780 of the Code, and Rule 37 of the supreme court. The exercise of this power is subject to review. (*The People ex rel. The Mayor agt. Nichols, ante, 200.*)
2. Bringing on for hearing a *certiorari* upon the return thereto, is like a motion for judgment on the pleadings, on the ground that the answer raises no issue of fact, and it would present a question of law only. Such motion is of the class called *non-enumerated*, as defined by supreme court Rule 38. (*Id.*)
3. Rule 44 of the supreme court, which provides that a case on *certiorari* may be brought to a hearing "upon the usual notice of argument at special term," is controlled by section 780 of the Code, which authorizes the judges to prescribe a notice of less than eight days. (*Id.*)
4. A motion for a new trial, made upon the minutes of the judge presiding at the trial, can only be made before him at the same term in which the trial was had. (*Thayer Manufacturing Jewelry Company agt. Steinau, ante, 315.*)

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5. For the purposes of such motion, it is not necessary to make a case. The proceedings being fresh, the judge's minutes are presumed to disclose the error, if any exists. (*Id.*)
6. When a motion for a new trial is made at special term, it should be founded upon a case made and settled according to the rules and practice of the court. In no other way can it be well determined by a judge, other than the one who tried the cause what transpired at the trial and what questions distinctly arose. (*Id.*)
7. An omission to move for a new trial on the minutes during the trial term, under section 999 of the Code of Civil Procedure, cannot be cured by a subsequent direction of the judge before whom the trial was had, after the end of the term, that such motion be made at the special term upon the minutes of the judge who presided at the trial. (*Id.*)
8. An order denying a motion to set aside a judgment for deficiency in a foreclosure suit, where the motion is based upon the fact that by a clerical error the name of the defendant against whom such judgment is rendered was omitted from the prayer for judgment for deficiency in the copy of the complaint attached to the judgment roll, is not reviewable here; it involves simply questions of practice. (*Trucker* agt. *Leland*, 75 N. Y., 186.)
9. So, also, an order denying a motion to set aside judgment of foreclosure and sale because of non-joinder of a party defendant, is not reviewable here. (*Id.*)
10. In an action to foreclose a mortgage, A. & G. were made parties defendant; their interests were the same, G. claiming as grantee of A. They put in separate answers; the

litigation was upon the answer of A. Plaintiff obtained judgment; A. appealed, G. did not. The minutes of the decision of the general term were as follows: "Judgment reversed, new trial granted, costs to appellant to abide the event." An order was thereupon entered reversing the judgment as to A. only, and directing a new trial as to her. It appeared by the opinion of the general term to have been its intention to reopen the whole case and to send it back for a new trial as to all the parties interested. Plaintiff, without notice to G., discontinued as to A. On motion of G. the general term modified its order so as to reverse the judgment *in toto* and to grant a new trial both as to G. & A.:

Held, that the general term had power to so modify; and that upon appeal to this court from the order directing the modification the question as to the power of the general term to reverse a judgment against a party who had not appealed was not presented, as its judgment was not up for review; that the question could only be presented by appeal from the order of reversal. (*Salmon* agt. *Gedney*, 75 N. Y., 479.)

11. Plaintiff recovered \$1,000 against H. for three libelous publications, he then brought this action for the same and for two other publications in the same newspaper, the five causes of action being set forth in separate counts, and a recovery of \$4,000 was had upon all the counts. Pending an appeal from this judgment the former judgment was paid, and plaintiff thereupon moved to vacate the latter judgment:

Held, that the motion was premature. (*Woods* agt. *Pungburn*, 75 N. Y., 495.)

12. The general term directed that the judgment be set aside, that the three counts upon the causes of action common to both actions

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be withdrawn and a new trial had as to the others:

Held, error; that the court had no power to vacate a judgment in which there was no irregularity and which had not been paid in full. (*Id.*)

13. Where an attorney employed by a husband to bring a divorce suit enters into collusion with the wife to manufacture evidence, which if not wholly untrue is deceptive, and thus to enable the husband to procure a divorce, this is an act of professional misconduct which authorizes an order disbarring the attorney. (*In re Gale*, 75 N. Y., 526.)

14. The doctrine of *res adjudicata* does not apply in its strictness to orders made on special motions. (*Eaton* agt. *Pickersgill*, 75 N. Y., 599.)

15. The matter may be moved again on leave granted and on a new state of facts. (*Id.*)

16. An order refusing to punish an alleged contempt in disobeying an injunction is not appealable to this court. (*Simmonds* agt. *Simmons*, 75 N. Y., 612.)

17. A regular notice of appeal had been served herein, and an undertaking given which was not in compliance with the statute, and so was a nullity, a return was made and the cause put upon the calendar. The appellant moved to strike the cause from the calendar; the respondent moved to dismiss the appeal:

Held, that the cause must be treated as if only a notice of appeal had been served; that, as this was regular, it could not be set aside, and as there was no undertaking there was no appeal to dismiss, no return could properly be made, and the cause was not properly upon the calendar; appellant's motion, therefore, granted, and respondent's denied. (*Ray-*

mond agt. *Richmond*, 76 N. Y., 106.)

18. An order directing judgment upon a pleading, as frivolous, is not appealable to this court; a frivolous pleading is not stricken out, but remains upon the record and becomes part of the judgment roll; and an order directing judgment thereon is only reviewable here upon appeal from the judgment. (*Com. Bk.* agt. *Spencer*, 76 N. Y., 155.)

19. Where a judgment creditor seeks by motion to set aside a prior judgment on the ground of fraud, it is within the discretion of the supreme court, whether to determine the matter on motion, or to require the creditor to bring an action; and from its determination no appeal lies to this court. (*Beards* agt. *Wheeler*, 76 N. Y., 218.)

20. The provision of the Revised Statutes, in relation to contempts (2 R. S., 534, sec. 1, sub. 3), which provides for the punishment as for a contempt of "disobedience to any lawful order, decree or process of a court of record," embraces disobedience of a peremptory *mandamus*; the writ is to be regarded as an order of the court, within the meaning of the statute. (*People ex rel. Garbutt* agt. *R. and S. L. R. R. Co.*, 76 N. Y., 294.)

21. A decision of the court, sustaining or overruling a demurrer, is an order, not an interlocutory judgment; and, as in the provision of the Code of Civil Procedure (*now Code*, sec. 1349), specifying appealable orders, this is not enumerated, an appeal to the general term from such a decision does not lie. It can only be reviewed on appeal from a final judgment entered thereon. (*Com. Val. Nat. Bank* agt. *Lynch*, 76 N. Y., 514.)

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23. Where, in an action against partners upon a partnership obligation, separate judgments are entered against each of the defendants, instead of a joint judgment against all, this is an irregularity merely; and the court has no power to set aside the judgments on motion, unless motion is made within one year after their rendition (2 R. S., 359, sec. 2). (*Judd L. and S. O. Co. agt. Hubbell*, 76 N. Y., 543.)

23. Where there has been a series of orders connected with the same matter, so that if one is erroneous all are, upon appeal from one the general term is authorized to reverse the whole, so as to leave the records of the court clear and consistent. (*Stanton agt. King*, 76 N. Y., 585.)

24. The provision of the new Code (sec. 1817), in reference to, and so far as it affects, this point, does not differ from the old (sec. 830). The general term, however, in such case, can only grant costs of one motion, and an appeal from one order. (*Id.*)

25. A final judgment for one of several defendants, upon demurrer to the complaint, is, so far as the causes assigned for demurrer are sustained by the judgment, as complete an adjudication in his favor as would be a judgment of nonsuit on trial; and plaintiff can not nullify its effect by obtaining an *ex parte* order discontinuing the action as to such defendant. (*Id.*)

26. An order denying a motion to set aside a verdict and for a new trial, because of the alleged misconduct of a jury, is not reviewable here. The provisions of the new Code as to the jurisdiction of this court in such a case are not materially different from the old, (*Gale agt. N. Y. C. and H. R. R. Co.*, 76 N. Y., 594.)

27. Where in an order of general term, reversing a judgment entered upon a decision of the court on trial without a jury, it is not stated that the reversal was upon questions of fact, the reversal to be sustained in this court must be justified by some error of law, the opinion cannot be looked to to ascertain the ground of the reversal; if upon the facts, it must appear in the body of the order (*new Code*, sec. 1838). (*Van Tassel agt. Wood*, 76 N. Y., 614.)

NATIONAL BANKS.

1. The last clause of section 5242, United States Revised Statutes, forbidding an attachment, injunction or execution to be issued against a national bank before final judgment in any proceeding in a state court, applies only to such banks as have committed or are contemplating an act of insolvency. (*Robinson agt. National Bank of New Berne*, ante, 306.)

2. An attachment can, therefore, issue against a national bank, except under the above circumstances, from a state court, as provided by the Code of Civil Procedure. (*Id.*)

NEGLIGENCE.

1. Where there is an elevator in the hallway of premises used by different tenants in common, which is inclosed, and has doors opening into the hallway on the first floor, upon which doors there are bolts for the purpose of fastening them, and a servant of a third person, lawfully on the premises, delivering goods to one of the tenants of the upper floors, mistakes the elevator for the stairs and walks into it, and falls through the aperture to the ground floor, receiving injuries which result in his death:

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Held, in an action brought by his administratrix, that, as the elevator was properly constructed and properly protected, the tenants on one floor are not liable for the negligent manner of use of the hatchway by the tenants on one of the other floors, and there being no affirmative proof showing specific acts of negligence on the part of any particular tenant, neither of the several tenants is liable, either severally or jointly with the others, for injuries resulting from such accidents. (*Donnelly* agt. *Jenkins et al.*, ante, 252.)

NEW TRIAL.

1. Where an order of the general term does not state that the reversal was on any question of fact, it cannot be sustained unless it be made to appear that some error of law was committed by the trial judge. (*Marshall and Miller* agt. *Davies and others*, ante, 281.)
2. Where a case comes before the general term, on appeal from the judgment and exceptions only, it has no discretionary power to order a new trial in the absence of legal error. (*Id.*)
3. A motion for a new trial, made upon the minutes of the judge presiding at the trial, can only be made before him at the same term in which the trial was had. (*Thayer Manufacturing Jewelry Company* agt. *Steinar*, ante, 815.)
4. For the purposes of such motion, it is not necessary to make a case. The proceedings being fresh the judge's minutes are presumed to disclose the error, if any exists. (*Id.*)
5. When a motion for a new trial is made at special term, it should be founded upon a case made and settled according to the rules and practice of the court. In no other way can it be well determined by a judge, other than the one who tried the cause, what transpired at the trial and what questions distinctly arose. (*Id.*)
6. An omission to move for a new trial on the minutes during the trial term, under section 999 of the Code of Civil Procedure, cannot be cured by a subsequent direction of the judge before whom the trial was had, after the end of the term, that such motion be made at the special term upon the minutes of the judge who presided at the trial. (*Id.*)
7. Where, on a motion for a new trial in an action of ejectment, the papers show that the motion is made on behalf of a party whose interest in the premises is at least doubtful, on a case where consent has been given to the judgment, such motion being made by an attorney who is not shown to have had any authority, and where it is very uncertain upon the papers what are the actual facts, and whether a case is made out for a new trial within the statute (2 R. S., 809, as amended by chapter 485, Laws of 1902), the motion should be denied. (*Sacia* agt. *O'Connor*, ante, 420.)
8. If the taking of judgment by consent was a default, the defendant should make his motion under section 88, and satisfy the court by affidavit that the ends of justice would be promoted, and the rights of the parties "more satisfactorily ascertained and established." (*Id.*)
9. A motion for a new trial, on the minutes of the justice before whom the action was tried, can only be made where a verdict has been rendered; it cannot be made where the plaintiff had been nonsuited. (*Van Doran* agt. *Horton*, 19 Hun, 7.)
10. Where the allegations of the complaint in an action are put at issue

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by the answer, and upon the trial are found in favor of plaintiff, but judgment is rendered thereon in favor of defendant, it is error for the general term upon reversal of the judgment to direct judgment for plaintiff; a new trial should be ordered. Defendant having obtained judgment is not called upon to except to the findings, or to insert the evidence in the case to show that they were controverted. (*Ehrichs* agt. *De Mill*, 75 N. Y., 370.)

NEW YORK (CITY OF).

1. The charter of the city of New York conferred upon the mayor the power to remove the relator "for cause, after opportunity to be heard."

Held, the power is not an arbitrary one, and can be exercised only upon just and reasonable grounds, and after notice; that the proceeding for removal must be instituted upon specific charges, sufficient in their nature to warrant removal; that such charges, unless admitted, must be proven; that on such proceedings the party has a right to cross-examine the witnesses against him, and to call witnesses in his own behalf, and to be represented by counsel; that these conditions must be complied with before the power of removal is exercised:

Held, further, that such proceedings are *judicial* and subject to review by *certiorari*, issuing from the supreme court. The powers of the supreme court to be exercised by the judges in general term, circuit, oyer and terminer or special term are conferred by the Constitution, and cannot be limited either by the legislature or by any power conferred by it upon the court itself. One special term, or one judge at special term, can have no more authority or power than another. (*The People ex rel. The Mayor* agt. *Nichols*, ante, 200.)

2. Under section 232 of the Code of Civil Procedure, the justices of a judicial department may appoint the times and places for holding special terms. If, under this power, some terms are designated as "*special terms for equity cases and enumerated motions*," and others as "*special terms for non-enumerated motions and chambers business*," such designation, in so far as it limits the class of proceedings to be had at *any* special term, is subject to the control of the justice assigned to hold it. By designating a special term as one for *non-enumerated motions and chambers business*, the power of the judge presiding thereat cannot be limited. Such term would still be a special term, and the justice holding it would have all the powers of *any* judge holding *any* special term. (*Id.*)
8. The power of the general term to grant a writ of prohibition addressed to the special term, is to be exercised in the same manner and to the same effect as when it is issued to inferior courts and magistrates, and the inquiry relates only to the jurisdiction. Error or mistake in practice affords no foundation for the writ, unless it involves doing something contrary to the general law. (*Id.*)
4. There is no absolute right to a notice of eight days on enumerated motions. A shorter notice may be prescribed by a judge or court, under section 780 of the Code, and Rule 87 of the supreme court. The exercise of this power is subject to review. (*Id.*)
5. Bringing on for hearing a *certiorari* upon the return thereto, is like a motion for judgment on the pleadings, on the ground that the answer raises no issue of fact, and it would present a question of law only. Such motion is of the class called *non-enumerated*, as defined by supreme court Rule 88. (*Id.*)

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6. Rule 44 of the supreme court, which provides that a case on *certiorari* may be brought to a hearing "upon the usual notice of argument at special term," is controlled by section 780 of the Code, which authorizes the judges to prescribe a notice of less than eight days. (*Id.*)
7. A person who, after the filing of the map changing the grade of a street, erects a building upon a lot fronting thereon, is not entitled to compensation for any damage sustained when the street is graded to conform with the new grade. (*The People ex rel. Murlough agt. Board of Assessors, ante, 827.*)
8. The board of assessors of the city of New York have power to alter or change the list of awards and assessments in cases of manifest error or mistake, even after the list has been advertised complete, and may do so of its own motion. (*Id.*)
9. An account stated, the amount agreed upon, and a promise to pay, furnish good grounds for an action at law, but no basis for a bill in equity instituted for the purpose of establishing a partnership and for an accounting. (*Kelly agt. Declin, ante, 487.*)
10. Although, as a general proposition, the legislature of a state is alone competent to make laws, it is well settled that it is competent for the legislature to delegate to municipal corporations the power to make laws and ordinances; which, when authorized, have the force, as to persons bound thereby, of laws passed by the legislature itself. (*Id.*)
11. Where the authority of the commissioners of public works to make and enter into contracts for the defendant, "the mayor, aldermen and commonalty of the city of New York," was conferred by chapter 385 of the Laws of 1873, commonly known as the city charter, which, among other things, provided that all contracts to be made or let for work to be done, or supplies to be furnished, shall be made by the appropriate heads of this department, under such regulation as now exist or shall be established by ordinance of the common council; the ordinance contained a provision that every proposal for work should contain the names of all persons who are interested, and prohibits any secret agreement or understanding that any person not named should become interested in any contract:
Held, that a secret partnership made by two persons that they were to be equally interested in the contract for the work obtained by one of the two partners, is illegal, being against public policy, and contrary to positive law. (*Id.*)
12. Where, by chapter 49 of the Revised Ordinances of 1845 (*secs. 1, 2*), the city of New York had been divided into two inspection districts, and consequently there were but two such officers, *i. e.* (inspectors of weights and measures), one for the first and the other for the second district, and while the ordinance was in force the mayor nominated four persons together as such officers:
Held, that although regularly and properly one person only should have been nominated for each of these offices and the persons should have been respectively named for the office to be received by them, yet the irregularity in the nomination was not such as to render it absolutely void. (*The People ex rel. Banta agt. Kneissel, ante, 404.*)
13. The power of nomination existed to the extent of two officers, and the selection of four persons instead of two did not invalidate the exercise of it. (*Id.*)

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14. Where the nominations were acted upon separately by the board of aldermen and the case of the relator was first considered and disposed of by itself, confirming his nomination but without any designation of the district which should be given to him:

Held, that although the proceeding in this respect was not entirely regular, it was evidence of the assent and approval of the board that he should receive one of the vacant offices, and as the first would naturally be considered and filled in the first instance, it may be reasonably presumed that such was the intention and purpose of the board, and that rendered the relator's appointment as inspector for the first district effectual and lawful. (*Id.*)

15. By section 25 of chapter 835 of the Laws of 1873, an inspector of weights and measures can only be lawfully removed by the mayor after affording him an opportunity to be heard, and after that the removal cannot take effect without the approval of the governor in writing. (*Id.*)

See POLICE COMMISSIONER.

The People ex rel. Nichols agt. *Cooper*, ante, 358.

NON-RESIDENTS.

1. A non-resident need not furnish security for costs if he begins suit in a justice court or municipal court, although such security could be compelled if suit was commenced in courts of record, but not when an appeal is taken to the county court. (*Mollen* agt. *Hutchins*, ante, 349.)

2. It seems that the statute permitting a plaintiff to prosecute as a poor person is not intended to apply to non-residents, but was solely for the benefit of residents of the state. (*Christian* agt. *Gouge*, and another, ante, 445.)

3. A valid judgment *in personam* cannot be obtained against a non-resident of the state who is not personally served with process and does not appear in the action. (*Bartlett* agt. *Spicer*, 75 N. Y., 528.)

4. A state cannot authorize such a judgment, which will bind property not within the state at the time and not proceeded against *in rem*, in satisfaction of the claim. (*Id.*)

5. Where one of the associates in a joint enterprise is a non-resident, he is not a necessary party to an action brought by another of the associates, for an accounting and for contribution for losses and expenditures paid by him. (*Angell* agt. *Lawton*, 76 N. Y., 540.)

6. And, so, where a non-resident associate has died, leaving no property in this state which would authorize the appointment of personal representatives here, and his personal representatives are not within the jurisdiction of the court, they are not necessary parties to the action. (*Id.*)

NOTICE.

1. An action cannot be maintained upon an undertaking, given under section 848 of the old Code, upon appeal to the general term, without proof of service upon respondent, ten days before the commencement of the action, of a written notice of the entry of the order or judgment affirming the judgment appealed from. (*Rae* agt. *Beach*, 76 N. Y., 164.)

2. In an action upon such an undertaking the only paper claimed to have been served was what purported to be a copy of an order made at general term, April 28, 1875, marked as received by respondent's attorney, April twenty-ninth. There was no notice indorsed, and no intimation in or

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upon the paper that the same had been entered. The judgment roll, which was produced on trial, contained the original order; there was nothing thereon to indicate that it had been filed or entered, prior to the entry of the judgment, which was on May 15, 1875:

Held, that the presumption, in the absence of proof, was that the order was neither filed nor entered until the judgment roll was filed and docketed, and that, therefore, the facts failed to show service of the required notice; and that the omission was not a mere irregularity, but a vital defect, fatal to a recovery; also, that defendants did not waive service of notice by not pleading the failure to serve; also, that they did not waive this defense by basing their refusal to pay, when called upon, on other grounds. (*Id.*)

3. Also, *held*, that an admission, upon the part of the appellant in the original action, without the knowledge or assent of the sureties, to the effect that he had received the notice required, could not affect the rights of the sureties. (*Id.*)

4. As to whether the said section did not require a notice of the entry of judgment, where judgment was in fact obtained; and as to whether the reference to orders was intended to apply where a judgment not an order was appealed from, *quarre*. (*Id.*)

5. A notice of the entry of judgment, which is not indorsed or subscribed both with the name of the attorney and his office address or place of business, as required by the general rules of practice (*rule 2*), is irregular and ineffectual to limit the time for appealing. (*Kelly* agt. *Sheehan*, 76 N. Y., 325.)

6. A warranty does not extend to known defects; and in an action to recover for an alleged breach parol evidence is competent to

show that at the time of entering upon the contract plaintiff had knowledge or notice of the real facts. (*Bennett* agt. *Buchan*, 76 N. Y., 886.)

7. The notice which will estop the party from claiming a breach of a covenant, may be either actual or constructive. Notice to the agent who negotiated the contract on his part is notice to him. (*Id.*)

8. If the agent acquires knowledge of a fact while engaged in the business of his principal which should put him upon inquiry, and fails to institute the proper inquiries by reason of forgetfulness, it is negligence, and the doctrine of constructive notice applies. (*Id.*)

9. The possession which will constitute constructive notice of an unrecorded deed to a subsequent purchaser must be under the deed, and actual, open and visible, so that the subsequent purchaser could have gone upon the land and obtained by inquiry information of such deed. (*Page* agt. *Waring*, 76 N. Y., 463.)

10. While every person is chargeable with notice of bankruptcy proceedings legally and properly conducted, such notice is only for the protection and efficacy of the proceedings. A party to a controversy, who does not claim under, and bases no right upon, said proceedings, cannot claim that the opposite party is charged thereby with any notice whatsoever. (*Id.*)

11. Such proceedings are in no case constructive notice of facts not needful or proper to be stated or to appear therein. (*Id.*)

12. It is not necessary for the bankrupt to make any statement in his schedules or otherwise as to property formerly owned by him, but which he did not then own, and in which he had for a long time ceased to have any interest. (*Id.*)

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13. There can therefore be no constructive notice of statements in the bankrupt's schedules as to such property. (*Id.*)
14. The constructive notice which every one has, at common law, of proceeding in courts of record is only of pending proceedings; after judgment fixing the rights of the parties, no such notice is implied. (*Id.*)
8. The final order must be that which ends the proceeding, and cannot be any of these, which must be made during progress. (*Id.*)
4. Where a warrant of attachment having been granted against the property of the defendants as non-residents, an order was obtained for the service of the summons by publication which was entitled, "At special term of the supreme court of the state of New York, held at chambers. Present, hon. ABRAHAM R. LAWRENCE, justice;" it recited: "The plaintiffs having presented to me the verified complaint in this action, * * * and having also made proof to my satisfaction that said defendants are not residents of this state;" it was signed "Enter. A. R. L., J. S. C." It did not appear that the order had ever in fact been entered as a court order, but it was shown that the order was in fact made and signed out of court, in the judge's private room:

OFFICIAL SEARCH.

See REGISTER (OF NEW YORK).
Van Schaick agt. *Sigel*, ante, 211.

ORDERS.

1. A writ of *certiorari* should not be allowed before a final order is made. (*Matter of Hamilton and Deane*, ante, 290.)
2. The defendants are railroad commissioners of the town of Cobleskill, in the county of Schoharie, and proceedings were taken against them under chapter 807 of the Laws of 1879, entitled "An act to provide for the summary investigation of unlawful or corrupt expenditures by officers of towns or incorporated villages, and for restraining the same." Objection was made to such proceeding on the ground that they were not town officers, and, therefore, not amenable to the provisions of said act. This objection was overruled and they were directed to account: *Held*, that the order directing the investigation to proceed was not a final order. The final order to be made is one "restraining and prohibiting such unlawful or corrupt expenditure, appropriation, squandering or waste of such moneys" (these which came into their hands as officers of the town) "under penalty, for disobedience, of fine or imprisonment, or both, in the discretion of the court." (*Id.*)
5. The caption of the order and the direction to enter are not conclusive as to its character, but the court will look at the facts as proved by the papers to exist to determine its character. (*Id.*)
6. Where an order had been made for the service of the summons by publication, which order was similar in all respects to that in *Phinney* agt. *Broeschell* (ante, 492), but it did not appear, as in that case, that the order had been made in the judge's private chambers: *Held*, that it was not void by reason of its having a caption and a direction to enter, but could be treated as the order of a judge. *Held, also*, that the order might be amended, on motion, after it

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had been acted upon, by striking out the superfluous portions. (*Mojarietta et al agt. Saens et al, ante, 494.*)

PARTIES.

1. Where a deed of trust directs, in plain terms, in what particular securities funds coming into the hands of the trustees shall be invested and how, until so invested, they shall be held, the court cannot, by its judgment, defeat the intentions of the creator of the trust, and the beneficiaries thereunder, by directing different investments. (*Clark agt. St. Louis, Alton and Terre Haute R. R. Co., ante, 21.*)
2. Without the consent of those beneficially interested in the trust, investments directed to be made in first mortgage securities, cannot be made through the judgment of the court, in those of an inferior lien. (*Id.*)
3. For the purpose of securing such change in investment, the trustees do not represent the beneficiaries, and an action to this end cannot be prosecuted in their names, the beneficiaries not being parties defendant, and having no opportunity to be heard in relation to the propriety of granting such relief. (*Id.*)

See COMPLAINT.

De Witt agt. McDonald, ante, 411.

4. The firm of Haas, Pike & Co. transferred all its property, real and personal, to S. N. Pike, one of the partners, upon the agreement that he should sell the property, pay the firm debts from the proceeds thereof, and divide what might remain between the plaintiff and himself. Pike died in possession of the firm property, leaving a will, by which he devised his estate to the defendants, in trust, to manage the same and

apply the profits thereof to the use of his children until the youngest should become of age, and then to divide the same equally among them. After all the children had come of age, the plaintiff brought this action against the defendants, as executors and trustees, to compel them to account for the property received by their testator from the firm, and to pay to plaintiff his share thereof. One of the children applied to be made a party to the action, to enable him to protect his interest in the estate:

Held, that the application should have been granted. (*Haas agt. Craighead, 19 Hun, 396.*)

5. Where, upon the trial of an action, brought by a legatee and next of kin, to procure the removal of an executor, and compel him to account, it appears the plaintiff has assigned his interest in the estate as security for a debt, the court may direct a party holding it as security to be brought in as a defendant. (*Hood agt. Hood, 19 Hun, 300.*)
6. So far as mere legal rights are concerned the only proper parties to an action of foreclosure are the mortgagor, the mortgagee, and those who have acquired rights under them subsequent to the mortgage, and these parties only are affected by the judgment. (*Em. Ind. Segs. Bk. agt. Goldman, 75 N. Y., 128.*)
7. The plaintiff may make prior incumbrancers parties for the purpose of having the amount ascertained and paid out of the proceeds, but where no such purpose is indicated in the complaint, and no such provision is incorporated in the judgment, the prior lien is not cut off. (*Id.*)
8. Where one contracts with a municipality to perform in its stead the duty resting upon it of keeping its streets in repair and safe for the

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- passage of the public, and where because of neglect to perform the duty a cause of action arises against the municipality, the action may be brought by the party injured directly against the contractor. (*McMahon* agt. *Second Avenue R. R. Co.*, 75 N. Y., 231.)
9. Where it distinctly appears from an instrument under seal that the seal affixed is the seal of the person subscribing, who designates himself as agent, and not the seal of the principal, the former only is the real party who can maintain an action upon the instrument. (*Schaefer* agt. *Henkel*, 75 N. Y., 378.)
 10. In order to take a case out of the general rule, where the contract is one valid without a seal, it must appear from the instrument that it was really made on behalf of the principal, or that he has derived benefit from and accepted and confirmed it by acts on his part. (*Id.*)
 11. B. having oral authority from plaintiffs to lease certain premises owned by them, executed in his own name, adding thereto the word "agent," a lease under seal, in which he described himself as "agent and party of the first part," but without stating for whom he acted as agent. In an action upon the lease, *held*, that in the absence of proof that the lessee had knowledge that such agent was acting for the owners, or had recognized their rights, and in the absence of an assignment of the lease, said owners could not maintain an action thereon in their own name to recover rent accruing thereunder; that such an action was not authorized by the provision of the Code (*old Code*, sec. 111) requiring an action to be prosecuted in the name of the real party in interest, as the parties executing such an instrument are the real parties in interest, they only being bound there-
 - by; also that the contract could not be regarded as a simple contract and the seal rejected as surplusage. (*Id.*)
 12. The lessee went into possession and paid rent, but it did not appear that he was in possession, otherwise than under the lease, or that any payment of rent had been made to plaintiffs:
Held, that the presumption was that the occupancy was under the lease; and that the evidence failed to show a ratification of the lease by plaintiffs. (*Id.*)
 13. Conceding that plaintiffs might have maintained an action for an occupation upon showing that B. had acted without authority in taking the lease in his own name, or that upon setting forth the want of authority, the lease might be resorted to as evidence of the terms of the agreement, although it could not be enforced as a specialty, this does not authorize a recovery where the action is founded solely upon the instrument, and where upon the trial plaintiffs claim to recover solely by virtue thereof. (*Id.*)
 14. Where one of the associates in a joint enterprise is a non-resident, he is not a necessary party to an action brought by another of the associates, for an accounting and for contribution for losses and expenditures paid by him. (*Angell* agt. *Lawton*, 76 N. Y., 540.)
 15. And, so, where a non-resident associate has died, leaving no property in this state which would authorize the appointment of personal representatives here, and his personal representatives are not within the jurisdiction of the court, they are not necessary parties to the action. (*Id.*)

PARTITION.

1. A purchaser under a sale in partition is protected against all ir-

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regularities in the judgment or in the proceedings upon which it was founded, which do not affect the jurisdiction of the court over the subject-matter or the parties. (*Jordan* agt. *Van Epps*, ante, 838.)

2. Referees making sales in partition are to be allowed the same commissions prescribed by law for executors and administrators (*Laws of 1869, vol. 2, p. 1878, sec. 4*), viz.: For receiving and paying out all sums of money not exceeding \$1,000, at the rate of five dollars per cent; for receiving and paying out any sums exceeding \$1,000, and not amounting to \$10,000 at the rate of two dollars and fifty-cents per cent; for all sums above \$10,000 at the rate of one dollar per cent (3 *R. S.* [6th ed.], 101, sec. 71). (*Strauss* agt. *Hellman*, ante, 877.)

3. The commission is provided as a compensation for both receiving and paying out the money, and for that alone. (*Id.*)

4. Where a referee, who was appointed to make a sale in partition, sold the property subject to certain mortgages, the purchase-money actually paid being \$7,650, while the mortgages, subject to which the property was sold, appear in the aggregate to have been \$16,500:

Held, that he could only charge commissions on the amount actually paid; he could not charge commissions for the amount of the mortgages subject to which the property was sold. (*Id.*)

5. The provision of the act of 1869 (sec. 4, chap. 589, *Laws of 1869*), entitled "An act in relation to the fees of sheriff of the city and county of New York, and to the fees of referees on sales in partition cases," which fixes the fees of referees, on partition sales, is not local, but public, and is not affected by the fact that certain local provisions of the act are violative

of the constitutional provision (art. 16, sec. 8) prohibiting the passage of a private or local bill containing more than one subject, and requiring that to be expressed in the title. (*Richards* agt. *Richards*, 76 *N. Y.*, 186.)

PARTNERSHIP.

1. A wife may contract with her husband in her business, and may enter into a valid partnership agreement with him under the laws of this state. Such being the fact the husband may lawfully use as the firm name "J. Zimmermann & Co.;" and the term "Co." legally representing the wife does not offend the provisions of the act of 1833 (chap. 281), providing that where the designation "& Co." is used it shall represent an actual partner. (*Zimmermann* agt. *Erhard and Dodge*, ante, 11.)

2. The firm of H. & Co., executed a general assignment, under the state laws, to M. for the benefit of their creditors. Pending the administration of the estate, K., one of the late firm, brought this action against his former partners for an accounting and for judgment for alleged overdrafts:

Held, that, by virtue of the assignment, the title to all the firm assets was vested in the assignee, who alone could sue for their recovery, and that his proceedings, as well as his powers and duties, are regulated by statute. And the facts above set forth appearing upon the face of the complaint; also, *held*, that the complaint exhibited a complete defense, and that a demurrer, because it does not state facts sufficient, &c., was well taken, and should have been sustained at special term. (*Kushnemundt* agt. *Haar and Hengeller*, ante, 464.)

See *NEW YORK (CITY OF)*.
Kelly agt. *Doolin*, ante, 487.

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PATENTS.

See DRIVEN WELLS.

Christman agt. *Rumsey*, ante, 114.

PLEADINGS.

1. When a pleading is demurred to, the pleading to which it professes to be an answer may be attacked, and if insufficient to constitute an answer judgment may be directed accordingly. (*Giroin* agt. *Hickman* and another, ante, 244.)
2. In an action for breach of covenant of seizin, the complaint must point out the defect complained of, and tender an issue of fact to be sustained and to be met by proof. (*Woolley* agt. *Newcombe*, ante, 480.)
3. The Codes make no exception in pleading in actions of this kind and other actions. Whatever may have been the practice before the Codes in such a case, it is now the same as other actions. (*Id.*)
4. Where, upon the conveyance of land to an executor, as such, he gives back a purchase-money mortgage, as executor, he and his grantees are estopped from denying his appointment and authority, and it is unnecessary to allege in an action to foreclose the mortgage the time and manner of his appointment. (*Skelton* agt. *Scott*, 18 Hun, 375.)
5. Where the complaint, in an action to charge a trustee for a failure to file and publish the statement required by the said statute, sets out a copy of the report as filed and published, and alleges that it does not comply with the statute, the particular defects therein need not be set forth in the complaint. (*Glen's Falls Paper Co.* agt. *White*, 18 Hun, 215.)
6. In an action to foreclose a mortgage given by a husband and wife upon land of the wife, to secure a debt of her husband, the wife alleged in her answer "that the notes and mortgage mentioned in the complaint were obtained from this defendant by the agent of the plaintiff (and others in collusion with him) by duress of this defendant:"
Held, that the defendant could not prove upon the trial that she was coerced to execute the mortgage by the duress and constraint of her husband of which the plaintiff had no knowledge. (*Lord* agt. *Lindsay*, 18 Hun, 484.)
7. The complaint herein alleged that plaintiff's intestate was, for upwards of fifteen years next preceding his death, of unsound mind, and for that cause legally incapable of making the dispositions of his property thereafter set forth; that shortly before his death he transferred to the defendant several sums of money, amounting to \$4,000, upon the agreement that the defendant should pay interest thereon, every six or three months, to the intestate during his life, and thereafter interest on the whole or a part of the said moneys, to either his executor or administrator, for the benefit of his wife, or directly to his wife and to his sister, during their respective lives; that interest was paid to the intestate during his life; that the sister died shortly after the intestate, without having received any interest, and that none had been paid to the plaintiff, the administrator; that the plaintiff had, with the written consent of the widow, before the commencement of this action, tendered to the defendant a release of all liability under said agreement, together with the said written consent of the widow, and demanded a return of the money which had been refused. The plaintiff sought to recover the \$4,000, with interest from the time of demand.

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Upon a demurrer to the complaint, *held*, that the allegation as to the incapacity of the intestate to enter into the contract was one of fact and not of law, and was sufficient. (*Biggs* agt. *American Tract Society*, 19 *Hun*, 488.)

8. The bringing of an action in a name, purporting to be that of a corporation, is a sufficient averment of the plaintiff's corporate existence. (*Canandargua Academy* agt. *McKeehan*, 19 *Hun*, 62.)
9. The Code does not require the complaint, in an action for the claim and delivery of personal property, to be in any specific form; the only requirement in reference thereto is the general one, that it shall contain a plain and concise statement of the cause of action (*old Code*, sec. 142; *new Code*, sec. 481). (*West. R. R. Co.* agt. *Bayne*, 75 *N. Y.*, 1.)
10. Where a complaint contains the requisite allegations for such an action, by a principal against his agent to compel a surrender of the obligations of the former entrusted to the latter, and for damages arising from the detention, or, in case a surrender cannot be made, for the value of the instrument as valid obligations, that it avers some facts which the Code (section 207) requires shall be shown by affidavit, where a delivery is claimed, or that the alternative relief is asked, does not make the action one in replevin. (*Id.*)
11. Plaintiff's complaint alleged, in substance, that defendant issued a written instrument, as follows: "This certifies that the bearer, Charles Foster, is entitled to ten shares of the capital stock of the Bushwick Railroad Company, upon surrender of this certificate at the company's office, \$1,000," which was duly delivered to Foster; that the same came into the possession of plaintiff by purchase for value, and he is now the law-

ful owner and holder thereof; that defendant on presentation of the certificate refused to deliver said stock; and judgment was asked compelling a delivery, and that defendant pay interest on the value of the same, to wit, \$1,000, or in case of failure to deliver, judgment for \$1,000, with interest. On demurrer to the complaint, *held*, that it did not state a cause of action; that the complaint contained no sufficient averments to establish a cause of action for \$1,000, or the interest thereon, as there is no averment that the shares of stock are of any value, or that any duty or obligation rests upon defendant to pay interest; and that no cause of action was stated to compel the delivery of shares of stock: 1st. Construing the complaint rigidly it asks for the delivery of shares, which it was not in the power of defendant to do. 2d. Construing the instrument as an evidence of the right of Foster to ten shares of stock, the allegation of ownership as an averment of a valid assignment to plaintiff, and the prayer of the complaint as calling for the issue and delivery to plaintiff of a certificate, no facts were alleged showing an unjust refusal; if the corporation had no rules requiring evidence of the assignment and authority to make transfers of shares upon its books, the act of the former owner by which plaintiff became the lawful owner and holder was all that was required to entitle him to the shares, and he could not compel an extraordinary act on the part of defendant; if the defendant has duly prescribed rules for transfer before it will recognize the rights of assignees and give them evidence thereof, plaintiff has not averred them, nor has he alleged the presentation to defendant of any evidence of an assignment to him, or of authority to make a transfer, so that defendant was not put in default. (*Burrall* agt. *Bush. R. R. Co.*, 75 *N. Y.*, 211.)

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12. In an action for partition, by a receiver appointed in supplementary proceedings, the complaint alleged in substance that by an order duly made May 23, 1876, by the county judge of U. county in such proceedings, plaintiff was appointed receiver, &c., that such order was recorded in said county, that the real estate was situate therein, and that the judgment debtor acquired title on or about April 23, 1876. There was no allegation that the judgment roll was filed or that the judgment debtor resided in that county, or that the order or a certified copy thereof was filed and recorded in the office of the clerk of the county where the judgment roll was filed or where the judgment debtor did reside:

Held, that a demurrer to the complaint was properly sustained, as the conditions prescribed by the Code (*old Code*, sec. 293), which must exist before title to real estate vests in the receiver, did not appear. (*Dubois* agt. *Cassidy*, 75 N. Y., 296.)

13. Also, that plaintiff by virtue of his appointment only became vested with such property as the judgment debtor had at the time of the commencement of the proceedings, and there was no allegation that he owned the real estate at that time; but a proper inference from the facts alleged was that he acquired title after that time. (*Id.*)

14. A judgment for plaintiff will not be reversed on appeal because of an omission to aver in the complaint or to prove upon the trial a fact essential to the plaintiff's case, unless the defect was pointed out and is reached by a proper exception taken on the trial. (*Id.*)

15. In an action by the assignee of a mortgage against a grantee of the mortgaged premises, upon a covenant in his deed to pay the mortgage, the complaint alleged the execution of the mortgage by P.,

defendant's grantor, that it was given to secure a part of the purchase price of the mortgaged premises, and that at the time it was executed P. was the owner in fee. These facts were admitted in the answer:

Held, that in the absence of a demurrer, or of a motion on the part of defendant to make the complaint more definite and certain, or of any specification of any defect on the trial the complaint might be construed, for the purpose of upholding the judgment, as inferentially averring that the mortgage was given for a debt owing by P., and for which he was personally liable. (*Id.*)

16. In an action to foreclose a mortgage, defendant C. in his answer set up as "a second and further defense," in substance, that he was the equitable owner and in possession of the mortgaged premises when the mortgage was executed; that B., the mortgagor, had contracted to sell the premises to C., and the mortgage was given to secure a usurious loan negotiated by C. to enable him to make a payment to B.; that B. deeded to W. at C.'s request, subject to the mortgage, and that the latter held possession under a contract with W.; the answer asked that the mortgage and accompanying bond be adjudged to be usurious and void, and that they be delivered up and canceled:

Held, that such portion of the answer could only be considered as a defense, not a counter-claim, and no reply was necessary; that if intended as a counter-claim it should have been so characterized. (*Eq. L. Ass. Soc.* agt. *Cuyler*, 75 N. Y., 511.)

17. As to whether C. was a "borrower" within the meaning of the statute relating to usury, and so, entitled to interpose it as a defense, *quarre*. (*Id.*)

18. In an action by a national bank

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- upon a promissory note one count of the answer alleged, in substance, that the note was presented by its makers to plaintiff for discount for their sole benefit, which was known to plaintiff; that it discounted the note and "then and there knowingly, corruptly and usuriously deducted therefrom and took, received, reserved and charged by way of discount and * * * for the loan and forbearance of the sum of money secured by said note," a sum of money much greater than seven per cent for the time the note had to run, "to wit, the sum of \$160 or thereabouts," and asked that the interest paid and that which the note carried with it should be adjudged to be forfeited:
- Held*, that the said count sufficiently set forth a corrupt and usurious agreement, and was good as a plea of usury. (*Nat. Bk. of Auburn* agt. *Lewis*, 75 N. Y., 516.)
19. Also, *held*, that the facts stated established a case within the meaning and intent of the provisions of the national banking act in reference to usury (*secs. 5197, 5198*) authorizing the forfeiture of the interest, and that the same was available as a defense by way of set-off or rebatement; and that the recovery should be limited to the money actually loaned, without interest. (*Id.*)
20. Where action was brought against the members of a board of education of a union free school district jointly, as trustees, for negligence:
- Held*, that complaint could not be amended by striking out name of defendants and inserting that of corporation, nor could it be amended by striking out all the defendants' names, save one, and his designation as trustee; also, that a motion for amendment should be made at special term. (*See Bassett* agt. *Fish*, 75 N. Y., 304.)
21. Where a complaint is for fraud, the action cannot be maintained, on the ground of mutual mistake. (*McMichael* agt. *Kümer*, 76 N. Y., 86.)
22. An order directing judgment upon a pleading, as frivolous, is not appealable to this court; a frivolous pleading is not stricken out, but remains upon the record and becomes part of the judgment roll; and an order directing judgment thereon is only reviewable here upon appeal from the judgment. (*Com. Bk.* agt. *Spencer*, 76 N. Y., 155.)
23. Plaintiffs' complaint alleged that defendants "in concert did, by connivance, conspiracy and combination, cheat and defraud the plaintiffs out of certain goods of" a value specified:
- Held*, that the complaint did not state facts sufficient to constitute a cause of action. (*Cohn* agt. *Goldman*, 76 N. Y., 284.)
24. Where the complaint in an action does not state facts sufficient to constitute a cause of action, the objection is available on trial upon motion to dismiss the complaint. (*Tooker* agt. *Arnoux*, 76 N. Y., 397.)
25. Where a motion to dismiss is made upon that ground, the granting it is not a matter of discretion, but of legal right. (*Id.*)
26. Where the objection was raised and was not waived, and no amendment of the complaint was made or asked for on the trial, the correctness of the ruling denying motion to dismiss must be tested on appeal on the complaint, as it stood, not as it might have been changed by amendment; and if the ruling was erroneous, it is fatal to a recovery. (*Id.*)
27. The provision of the Code of Procedure (*old Code*, sec. 162; *new Code*, sec. 534) which provided that

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in an action upon an instrument for the payment of money only it should be sufficient to set forth a copy of the instrument and allege the amount due thereon, was not applicable where the liability of the party, by the terms of the instrument, was conditional, and depended upon outside facts; in such case those facts must be averred. (*Id.*)

28. Plaintiff's complaint set forth a copy of an order upon defendant, requesting him to pay to plaintiff a sum specified, "out of moneys to be realized from the sale" of certain houses described; it alleged an acceptance of the order by defendant, a payment of a portion of the sum, and that the balance was due:

Held, that the complaint did not state a cause of action; that a sale of the houses and receipt of money from such sale were conditions precedent to defendant's liability, and should have been averred; and that a denial of a motion to dismiss the complaint on trial was error. (*Id.*)

29. Also, *held*, that a denial in the answer of the receipt of any such moneys did not supplement the complaint in this respect. (*Id.*)

30. Plaintiff's complaint alleged, in substance, that upon a final accounting by him as administrator of the estate of W., he presented to the surrogate certain instruments under seal, executed by certain of the next of kin (defendants herein), releasing him from liability for, and assigning to him their distributive shares of said estate; that the solicitor for said next of kin stated before the surrogate his intention to dispute the effect, force and validity of said instruments, and asked the surrogate to disregard them; that said surrogate announced his intention to disregard them, and was about to enter a decree in favor of the parties, whom he had

paid and settled with, for a large amount, which would be to plaintiff's great and irreparable injury. It also alleged that Y., a daughter of the intestate, died prior to the accounting, leaving a will, which was left with said surrogate for probate, and probate applied for; but that no proceedings had been taken for that purpose, and the interest of the testator in the estate was unrepresented in the proceedings for settlement. Plaintiff asked that defendants be restrained from entering any decree requiring him to pay any sum to those who executed said instruments, and from entering any decree until the interest of Y. was represented before the surrogate. Upon demurrer to the complaint, *held*, that it did not state facts sufficient to constitute a cause of action. (*Wright* agt. *Fleming*, 76 N. Y., 517.)

31. To make a complaint good under the provision of the Code of Procedure (*old Code*, sec. 162; *new Code*, sec. 534), providing that in an action upon an instrument for the payment of money, it shall be sufficient to set forth a copy of the instrument and to allege that a specified sum is due thereon, the instrument so set forth must, upon its face, be a complete, valid and binding obligation. Where it is, upon its face, incomplete and invalid, and facts not stated in it, need to appear to show its validity, such other facts must be alleged. (*Broome* agt. *Taylor*, 76 N. Y., 564.)

32. Where a complaint upon a bond shows it to be the obligation of a married woman, it is essential to allege that it was given for some purpose, which would make it binding upon her; it is, *prima facie*, a nullity, and without such averments the complaint does not state a cause of action. (*Id.*)

33. The complaint herein alleged that defendants executed their

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bond under seal, a copy of which was set forth, and alleged that there was due plaintiff a specified sum thereon, for which judgment was demanded. The bond was joint and several; in it the obligors are described as husband and wife, as they are also in the title of the cause. Defendants demurred separately:

Held, that as to the husband, the complaint was good and the demurrer was frivolous; but that as to the wife a cause of action was not stated, and her demurrer was well taken. (*Id.*)

POLICE COMMISSIONER.

1. The mayor's power as to removal of a police commissioner is *judicial* and his judgment upon the question of removal is subject to review by this court on a *certiorari*; the accused official has a right to know what the specific charges against him are; such charges if not admitted must be proven, and the defendant should be permitted to cross-examine witnesses and to call witnesses in his own behalf, and in these and other respects to be represented by counsel. (*The People ex rel. Nichols* agt. *Cooper*, ante, 358.)
2. If the return of the mayor to a writ of *certiorari* issued out of this court, to review his proceedings in making such removal, shows that in all or any of these particulars the relator in such proceeding was denied his rights, the mayor's proceedings must be reversed, and his decision declared to be null and void. (*Id.*)
3. The return of the mayor to the writ of *certiorari*, in which is given all the proceedings had before him, on which a certificate of commissioner Nichols' removal from office was transmitted to the governor, is given in full in the opinion, and it is *held*:

That the relator did not have such a hearing before the mayor, as the twenty-fifth section of the charter entitled him to and, therefore, judgment should be rendered that the proceedings for the removal of the relator be in all respects reversed and set aside, and that the relator be reinstated in the office of police commissioner (*See, also, the Matter of Sidney P. Nichols*, 57 *How.*, 395; *The People ex rel. Nichols* agt. *Cooper*, *id.*, 463; *The People ex rel. Cooper*, agt. *Special Term at Chambers*, *id.*, 647; and *The People ex rel. The Mayor* agt. *Nichols*, ante, 200). (*Id.*)

See NEW YORK (CITY OF).

The People ex rel. The Mayor agt. *Nichols*, ante, 200.

POUNDAGE.

1. One Huntington, after the recovery of a judgment against him by the defendant, and shortly before the issuing of an execution thereon to the sheriff, executed and delivered to an assignee an assignment for the benefit of creditors, but at the time the execution was received the assignment had not been recorded, nor had the assignee given a bond or taken possession of the property. The sheriff, under the direction of the attorney for the judgment creditor, levied on certain of the property assigned by Huntington, but, in accordance with further directions from the attorney, took no further proceedings. Subsequently the property was sold by the assignee and a portion of the proceeds applied to the payment of defendant's judgment.

In an action by the sheriff to recover poundage on the value of the property so levied on, not exceeding, however, the amount collectable under the execution, *held*, that he was entitled thereto. (*Benedict* agt. *Wright*, 19 *Hun.*, 27.)

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PRACTICE.

1. This action was commenced to recover of the defendant, Bristol, defaulting county treasurer, and his sureties, certain amounts of money alleged to have been misappropriated by Bristol. Such moneys belonged to several distinct funds, viz.: the county fund, the infant heir fund, the asylum fund and the military fund. Judgment was rendered by the referee for a certain amount of county funds and costs. Both plaintiff and the defendants (except Bristol) appealed. The general term affirmed the judgment. The memorandum or decision was, "judgment affirmed, with costs." The plaintiff thereupon entered judgment, having previously, on notice, taxed the costs of the appeal at \$172.83, and issued execution to collect the original judgment and costs of the appeal:

Held (1st), that, as the plaintiff appealed from the entire judgment and on this appeal the judgment appealed from was affirmed; not in part but *in toto*, the respondents were entitled to their costs by law as a matter of right.

(2d). The defendants (except Bristol and Hathaway) also appealed in like manner as did the plaintiff; that is from the entire judgment. On this appeal, too, the decision was, that the judgment should be affirmed, and it necessarily follows that the respondent, on this appeal, was entitled to costs. The court could not deprive the respondents on each separate appeal, of costs, because, they were awarded by law as a matter of absolute right. (*Board of Supervisors* agt. *Bristol*, ante, 8.)

2. The memorandum or order of the general term was "judgment affirmed, with costs:"

Held, that this memorandum should have been followed on the record, by a judgment declaring the decision or adjudication sug-

gested by it, fully, as regards any, and all rights to which the parties were entitled under it. (*Id.*)

3. There could be, regularly, but one judgment, both appeals having been heard together, and the judgment being one of simple affirmance whereby both were determined, that judgment should declare the affirmance, and should, in due form, award costs to the parties entitled to them by law, and against those who were by law bound to pay them. To this end there might be separate clauses in the entry of judgment. (*Id.*)

4. Where, as in this case, a set-off of costs would seem proper, a clause to that end, following explanatory recitals, might be entered, if not without application to the court certainly on application at special term. It was within the just scope and power of the special term to correct and perfect the record as regarded the proper entry of judgment upon the facts disclosed. (*Id.*)

5. The special term should have recognized the rights of the respondents on each appeal to costs; and should have directed a set-off of the respondents' costs on the appeal taken by the plaintiff in reduction of the amount of the recovery against the former, and limited the recovery and execution against them to the balance only. (*Id.*)

6. An entry of judgment is irregular, which awards costs of appeal against a party who has not appealed. He is not chargeable with costs with his associate defendants, who, without him, took the appeal. The costs of the appeals are allowable against the appellants only, as to whom the judgment was affirmed. (*Id.*)

7. Where, on action brought to foreclose a mortgage of real estate,

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issues of fact are settled and tried by a jury, and after verdict application is made to the court before whom the trial was had for judgment on "the pleadings, proofs and answers of the jury to the questions submitted," and the trial judge "approved and adopted" the verdict, but made emendations and additions thereto and certified other findings, using in their support the evidence before the jury, to which findings exceptions are filed, it is error in the trial judge to strike from the case the evidence before the jury and the exceptions thereto. (*Chapin agt. Thompson, ante, 46.*)

8. He should, in settling such a case, present, to be inserted, so much of the evidence as was requisite to show the grounds of alleged error, and so much as related to his additions and emendations to the verdict. (*Id.*)
9. The trial judge could not properly limit the review by striking from the case the proceedings had before him, on which the appellant predicates error. It does not lie with him, in settling the case, to hold that the grounds of alleged error were untenable, or that they could not be considered by the appellate court. (*Id.*)
10. Such case being in equity the judge was not absolutely bound by the verdict. He could have disregarded it and have made findings in accordance with his own views of the case. (*Id.*)
11. *Quere*, whether, under the last clause of section 1003 of Code of Civil Procedure, a party in an equity case is not bound by the verdict if he fails, before final judgment, to move to set it aside and for a new trial. (*Id.*)
12. The trial judge in an equity case, where the issues are tried before a jury, should hear the motion for new trial on the case made. If he shall decide that such motion cannot be made after judgment, his decision can be reviewed on appeal. (Per BOARDMAN, J.) (*Id.*)
13. Order allowing amendments striking out evidence taken on the trial before the jury reversed, and case and exceptions sent back to the trial judge for resettlement. (*Id.*)
14. Where a plaintiff had, pending the action, transferred his interest and died, and after his death his assignee, on notice to the defendant alone, moves to be substituted as plaintiff, the motion should be denied for want of notice to the personal representatives of the deceased plaintiff. (*McLaughlin agt. The Mayor, ante, 105.*)
15. The charter of the city of New York conferred upon the mayor the power to remove the relator "for cause, after opportunity to be heard."

Held, the power is not an arbitrary one, and can be exercised only upon just and reasonable grounds, and after notice; that the proceeding for removal must be instituted upon specific charges, sufficient in their nature to warrant removal; that such charges, unless admitted, must be proven; that on such proceedings the party has a right to cross-examine the witnesses against him, and to call witnesses in his own behalf, and to be represented by counsel; that these conditions must be complied with before the power of removal is exercised.

Held, further, that such proceedings are *judicial* and subject to review by *certiorari*, issuing from the supreme court. The powers of the supreme court to be exercised by the judges in general term, circuit, oyer and terminer or special term are conferred by the Constitution, and cannot be limited either by the legislature or by any power conferred by it upon the court itself. One special term,

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- or one judge at special term, can have no more authority or power than another. (*The People ex rel. The Mayor* agt. *Nichols*, ante, 300.)
16. Under section 282 of the Code of Civil Procedure, the justices of a judicial department may appoint the times and places for holding special terms. If, under this power, some terms are designated as "*special terms for equity cases and enumerated motions*," and others as "*special terms for non-enumerated motions and chambers business*," such designation, in so far as it limits the class of proceedings to be had at any special term, is subject to the control of the justice assigned to hold it. By designating a special term as one for *non-enumerated motions and chambers business*, the power of the judge presiding thereat cannot be limited. Such term would still be a special term, and the justice holding it would have all the powers of any judge holding any special term. (*Id.*)
17. The power of the general term to grant a writ of prohibition addressed to the special term, is to be exercised in the same manner and to the same effect as when it is issued to inferior courts and magistrates, and the inquiry relates only to the jurisdiction. Error or mistake in practice affords no foundation for the writ, unless it involves doing something contrary to the general law. (*Id.*)
18. There is no absolute right to a notice of eight days on enumerated motions. A shorter notice may be prescribed by a judge or court, under section 780 of the Code, and Rule 37 of the supreme court. The exercise of this power is subject to review. (*Id.*)
19. Bringing on for hearing a *certiorari* upon the return thereto, is like a motion for judgment on the pleadings, on the ground that the answer raises no issue of fact, and it would present a question of law only. Such motion is of the class called *non-enumerated*, as defined by supreme court rule 38. (*Id.*)
20. Rule 44 of the supreme court, which provides that a case on *certiorari* may be brought to a hearing "upon the usual notice of argument at special term," is controlled by section 780 of the Code, which authorizes the judges to prescribe a notice of less than eight days. (*Id.*)
21. The rule that a covenant in a deed against incumbrances which is broken when the deed is delivered, does not pass like covenants that run with the land to a subsequent purchaser, as it is a chose in action which is not assignable, is no longer the law in this state. (*Boyd* agt. *Belmont*, ante, 513.)
22. Under the Code all choses in action are assignable, except those that, from their nature or because they are forbidden by law, cannot be assigned, such as the right to a revolutionary pension, the unearned salary of a public officer, the beneficial interest of a *cestui que trust* in certain cases, &c., and the action must be brought in the name of the assignee, he being the real party in interest. (*Id.*)
23. The distinction between a covenant and a covenant broken is, therefore, no longer material in this state, the covenant, though broken, being assignable and sueable in the name of the assignee. (*Id.*)
24. The covenant against incumbrances (now that the objection that choses in action are not assignable no longer exists) necessarily passes to the person to whom the land is conveyed, together with the land, because, if there be an incumbrance, it affects the value of the land, and, to the extent of the incumbrance, impairs the title. (*Id.*)

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25. Accordingly, where the plaintiff, by the sheriff's deed, acquired all the rights in the property which the defendant had conveyed to B., and when the plaintiff, to save her estate from the effect of the incumbrance, was compelled to pay it off, the defendant having refused so to do, *held*, that she could maintain an action upon the covenant which had passed to her with the land by assignment, to recover the damages she had sustained by the breach of it. (*Id.*)
26. An allegation in an answer "that the contract set forth in said complaint is inoperative and void for want of a sufficient and adequate consideration therefor," is an allegation of a conclusion of law. It is necessary to aver the facts which would show that there was no sufficient and adequate consideration. (*Hammond* agt. *Earle and another*, ante, 426.)
27. Each answer must, of itself, be a complete answer to the whole complaint, as perfectly so as if it stood alone. Unless, in terms, it adopts or refers to the matter contained in some other answer, it must be tested as a pleading alone by the matter itself contains. If it is not complete, in and of itself, it is insufficient in law and cannot be sustained by reference to the other defenses contained in the answer. (*Id.*)
28. A defense that the plaintiff is not the real party in interest, is not available unless supported by facts pleaded like any other defense. (*Id.*)
29. The defense of recoupment is available, if facts support it, whether pleaded for that purpose or otherwise. If the allegations in respect to that defense are not sufficiently definite and certain to enable the plaintiff to understand them, or to raise a clear and precise issue, the remedy by the plaintiff is by motion to make more definite and certain. (*Id.*)
30. Where the facts alleged in the answer are sufficient to entitle the defendant to a recoupment of his damages, even if they are obscurely or vaguely set forth, the answer is not, for that reason, demurrable. (*Id.*)
31. Upon the trial of the plaintiff in error for murder, the court having ordered additional jurors to be summoned, the clerk brought into court the box containing the names of the trial jurors for the county, and the box containing those for the town, but not the one containing the names of those who had already served. The jurors having been duly summoned, the prisoner's counsel interposed a challenge to the array, on the ground that all the boxes were not brought into court as required by section 1059 of the Code of Civil Procedure. The court having sustained the challenge the prisoner's counsel withdrew it: *Held*, that by withdrawing the challenge the prisoner waived any informality in the drawing of the jury, and was concluded from objecting thereto on appeal. *Semble*, that as it did not appear that the names in the county jurors' box were exhausted, the failure of the clerk to bring into court the third box did not affect the validity of the drawing. (*Pierson* agt. *People*, 18 Hun, 239.)
32. A confession of judgment in which the defendant states that the indebtedness "is for a debt justly due from me to said plaintiff for moneys to that amount loaned and advanced to me by said plaintiff," is sufficient as between the parties and is only voidable, if at all, in a direct action or motion to vacate it by a junior judgment creditor or bona fide purchaser. (*Torrett* agt. *Brooklyn Improvement Co.*, 18 Hun, 6.)
33. This action was brought by the plaintiff against the defendant, individually, and as executrix of

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J. A. Mead, deceased, upon an indebtedness of the deceased, consisting of two notes and a judgment, amounting in all to \$1,500. The complaint alleged the appointment of the defendant as executrix July 2, 1877, and that she was sole legatee; that the only assets of the estate were about \$500 worth of personal property, and land in Wisconsin, worth about \$1,500; that shortly before his death the testator had assigned, without consideration, a policy of insurance upon his life to the defendant who had collected it; that defendant had filed no inventory of his estate and was about to leave the state and take the assets of the estate with her:

Held, that the action could not be sustained as a creditor's bill, as the plaintiff had not exhausted its remedy at law. (*Genesee River Nat. Bank* agt. *Mead*, 18 *Hun*, 808.)

34. That, upon the facts stated in the complaint, the defendant could not be arrested under subdivision 4 of section 550 of the Code of Civil Procedure (the substitute for a writ of *ne exeat*). (*Id.*)

35. That the complaint did not state facts sufficient to constitute a cause of action, and that the plaintiff might move at any time after service of the complaint to vacate an order of arrest granted in the action upon affidavits containing the same allegations as the complaint. (*Id.*)

36. That such motion might be made more than twenty days after the order of arrest was served. (*Id.*)

37. This was an action brought by the plaintiff to recover the damages sustained by him, by reason of his falling through an open hatchway on the defendant's premises. After the jury had retired, and in the absence of counsel, the jury sent to the judge a communication asking if plaintiff

had been paid his salary while laid up, to which the judge replied that there was no evidence upon that subject, and that if it was paid it was a mere gratuity. Subsequently the jury being unable to agree came into court, and it was claimed that plaintiff's counsel was then informed of what had taken place, and made no objection. The jury then retired and brought in a verdict for plaintiff for fifty dollars.

On a motion by the plaintiff's counsel to set aside the verdict, on the ground of such communication having been made, *held*, that if the plaintiff knew of it, and made no objection to the jury's retiring for the second time, he thereby waived the irregularity. (*Mahoney* agt. *Decker*, 18 *Hun*, 365.)

38. That, as in no event could he have been prejudiced by the communication, it furnished no ground for granting a new trial. (*Id.*)

39. In 1853, the defendant Smith being indebted to a firm composed of Jacob Smith and Reuben Edwards, for lumber purchased of it, and for interest thereon, gave them his note under seal, payable to their order, and also a mortgage on land to secure the payment of the amount due. Subsequently the firm was dissolved and the note and mortgage were transferred to Smith, undorsed. Thereafter he, without authority, but not with a fraudulent intent, struck from the note the name of Edwards.

In an action to foreclose the mortgage, *held*, that although the note was destroyed by this alteration, yet the debt which it was given to secure was still unpaid, and could be collected by foreclosing the mortgage. (*Gillette* agt. *Smith*, 18 *Hun*, 10.)

40. Before the commencement of this action, an action had been

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commenced upon the note, which was still pending:

Held, that this was not a bar to the action of foreclosure. (*Id.*)

41. A mortgage given to secure the payment of a simple contract debt may be foreclosed at any time within twenty years. (*Id.*)

42. Section 111 of the Code of Civil Procedure, provides that when, in the county of Kings, the sheriff has actually confined in jail a prisoner arrested by virtue of an execution, issued upon a judgment recovered in a court of record, he shall notify the attorney for the plaintiff, and the latter shall, within the time therein prescribed, pay to the sheriff the sum of twenty-five dollars for his support during the first twenty days, and that "if a payment required by this section be not made, the prisoner must be discharged."

Held, that this provision included the case of an execution issued in favor of a defendant as well as that of one issued in favor of a plaintiff. (*People ex rel. Riedman* agt. *McOue*, 18 *Hun*, 54.)

43. That upon the failure of the attorney to make the required payment, the sheriff must at once discharge the prisoner, and that no order of the court was necessary to authorize him so to do. (*Id.*)

44. The petitioner alleged that he was retained as counsel by the appellant, who acted as attorney for the commissioners appointed to open a street; that it was agreed that the petitioner's fees and charges should be \$500; that they were taxed and certified at that amount; that the appellant undertook to, and did, collect that amount, but neglected and refused to pay it over, and the petitioner applied for an order that the attorney pay the money over to him. The attorney filed an answer denying all the allegations of the

petition. This appeal was taken from an order appointing a referee to take proof as to the facts:

Held, that the facts alleged showed that the relation existing between the parties was not that of attorney and client, but that of debtor and creditor, and that the controversy between them should be settled in an action, and not on a summary application to the court. (*Matter of Haskin*, 18 *Hun*, 42.)

45. The defendant placed piers in the bed of a stream running through his land, and thereby obstructed its natural flow and caused the water to set back upon the lands adjoining the stream further up. This action was brought by several of the owners of separate parcels of the lands, upon which the waters were so set back, to abate the nuisance and restrain the further continuance thereof:

Held, that the several plaintiffs properly joined in bringing one action, and that it could be maintained. (*Gillespie* agt. *Forest*, 18 *Hun*, 110.)

46. The plaintiffs, who were sureties upon a note upon which the defendants were liable as principal debtors, being compelled to take it up, paid the holder by giving him their joint note for part, and paying the balance in money, raised upon the discount of a note made by one surety to the order of the other, and discounted for their joint benefit:

Held, that the note having been paid by the sureties jointly, they could maintain a joint action to recover the amount thereof from the principal debtors. (*Enos* agt. *Leach*, 18 *Hun*, 189.)

47. A misjoinder of parties plaintiff is not a ground for the dismissal of the complaint, as to all the parties plaintiff, if either has a good cause of action. (*Id.*)

48. The objection of misjoinder of

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- parties plaintiff should be raised by answer or demurrer. (*Id.*)
49. A written complaint made before a magistrate alleged that certain goods had been stolen, and that the complainant "has probable cause to suspect, and does suspect that Frederick Blodgett" stole them:
Held, that it was insufficient to justify the magistrate in issuing a warrant for the arrest of the accused. (*Blodgett* agt. *Race*, 18 *Hun*, 132.)
50. When an action pending in the county court is called for trial, and it is, by the consent of the parties, sent to a referee to hear and determine, the fact that the county judge is disqualified from sitting by reason of relationship to one of the parties, does not render such order void, or the judgment entered upon the report of the referee invalid. (*Bell* agt. *Vernooij*, 18 *Hun*, 125.)
51. When during the pendency of an action in the marine court of the city of New York, the defendant dies, that court cannot direct the action to be revived and continued against his executors, as section 316 of the Code of Civil Procedure expressly provides that it shall not have jurisdiction of an action against an executor or administrator, in his representative capacity. (*People ex rel. Egan* agt. *Marine Court*, 18 *Hun*, 333.)
52. Where proceedings to remove an encroachment of fences upon a highway are instituted under the provision of the Revised Statutes, as amended by chapter 125 of 1870, the notice must specify the breadth the highway was originally intended to have had. (*Cook* agt. *Covill*, 18 *Hun*, 283.)
53. *Quare*, whether, where the encroachment is caused by a barn and not by a fence, proceedings to remove it may be instituted thereunder. (*Id.*)
54. During the trial of a prisoner on an indictment for libel, the court has power, at his request to withdraw a juror, and allow the case to go over the term. (*McFall* agt. *People*, 18 *Hun*, 332.)
55. Under chapter 769 of 1857, courts of sessions have power to grant new trials in cases tried before them. (*Id.*)
56. A motion to change the place of trial, on the ground that neither plaintiff nor defendant reside in the county where the venue is laid, cannot be made until after a demand therefor (as prescribed by section 986 of the Code of Civil Procedure) has been made by an attorney who has appeared in the action in one of the ways provided for by section 421 of the said Code. (*Van Dyck* agt. *McQuade*, 18 *Hun*, 376.)
57. Where, after a sale in foreclosure, but before its confirmation, the mortgagor, who remains in possession, attempts to remove from the premises machinery, claimed by the purchaser to constitute a part of the realty, an injunction restraining him from so doing may properly be issued under section 604 of the Code of Civil Procedure. (*Mut. Life Ins. Co.* agt. *Nat. Bank of Newburgh*, 18 *Hun*, 371.)
58. Since the passage of section 2 of chapter 151 of 1870, an action to dissolve a corporation for a failure to pay its notes or other evidences of debt, or for suspending its ordinary and lawful business for one year, can only be brought by the attorney-general. (*Wilmersdoerffer* agt. *Lake Mahopas Imp. Co.*, 16 *Hun*, 367.)
59. On an application, made under chapter 388 of 1858, to vacate an assessment, it is not necessary to

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notify one to whom the property has been sold for a failure to pay the assessment, although the time to redeem from the sale has expired, and a lease of the property has been delivered to the purchaser. (*Matter of Jones*, 18 Hun, 327.)

60. Under section 809 of the Code the unsuccessful party can recover only one extra allowance, although the case may have been tried several times. (*Flynn* agt. *Equitable Life Assurance Society*, 18 Hun, 212.)

61. It is the duty of the referee to find and set forth in his report the facts upon which his conclusions of law are based; but he is not required to set forth or explain the means or processes by which he arrived at such findings of fact. (*Dolan* agt. *Morritt*, 18 Hun, 27.)

62. A writ of *certiorari* will not issue to a village, to review alleged irregularities in the proceedings by which it is claimed to have been incorporated. (*People ex rel. Smith* agt. *Village of Nolliston*, 18 Hun, 175.)

63. The court may, in a proper case, make an order requiring the attorney for the plaintiff to furnish the defendant with the plaintiff's residence and address. (*Corbett* agt. *Gibson*, 18 Hun, 49.)

64. Where the complaint, in an action to charge a trustee for a failure to file and publish the statement required by chapter 40 of 1848, sets out a copy of the report as filed and published, and alleges that it does not comply with the statute, the particular defects therein need not be set forth in the complaint. (*Glen's Falls Paper Co.* agt. *White*, 18 Hun, 215.)

65. Where a policy of insurance is issued to the owner, and the loss is made payable to others, therein

named, as their interest may appear, a joint action lies thereon by the assured and those to whom the loss is made payable. (*Lasher* agt. *Northwestern Ins. Co.*, 18 Hun, 98.)

66. The issues in an equity action were framed and submitted to a jury; a verdict was rendered thereon; the whole case was afterwards heard before the same judge before whom the jury trial was had; he made his decision on which judgment was entered; a case was served on appeal containing the testimony and the plaintiff's exceptions to evidence taken on the jury trial, for which the judge on the settlement of the case substituted the specific questions of facts submitted to the jury and their answers thereto. The appellant then moved for a new trial of the issues of fact:

Held, that the party appealing had a right to include in the case the evidence given on the jury trial as well as any subsequently given before the judge alone. (*Chapin* agt. *Thompson*, 18 Hun, 446.)

67. In proceedings supplementary to execution the judge cannot direct property of the judgment debtor (a horse), to be delivered to the creditor on his giving the debtor a receipt for his claim. The property should be sold under an execution or by a receiver. (*Dickinson* agt. *Onderdonk*, 18 Hun, 479.)

68. To render an appeal to the county court from a judgment of a justices' court effectual, the respondent's costs included therein must be paid, and the justice's fees must be paid or relinquished by him within twenty days from the rendition of the judgment, and if they are not so paid the appeal will be dismissed. (*Thomas* agt. *Thomas*, 18 Hun, 481.)

69. An appeal lies to the general

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- term of the supreme court from a decision of the county court in proceedings for draining lands, instituted under chapter 888 of 1869, as amended by chapter 808 of 1871. (*Burk* agt. *Ayers*. 19 *Hun*, 17.)
70. A notice of appeal from the decision of the county court, affirming a decision of the drainage commissioners, need only be served upon the commissioners, the respondents in the county court. (*Id.*)
71. The notice of appeal to the county court from the determination of the drainage commissioners need not specify the errors complained of. (*Id.*)
72. To authorize a party to appeal from the determination of the drainage commissioners, it is not necessary that any of his land should have been actually taken; it is sufficient if he be the owner or possessor of land in any way affected by the proceedings. (*Id.*)
73. A decision of the county court affirming a judgment of the drainage commissioners, with a modification to the effect that on request of the appellant they should open a drain through his land, is a final judgment, so as to be appealable. (*Id.*)
74. An objection to the jurisdiction of the court below may be raised for the first time on appeal. (*Id.*)
75. Where in proceedings instituted for the drainage of lands, under chapter 888 of 1869, as amended by chapter 808 of 1871, neither the commissioners nor the county court determine that the proposed drainage is necessary for the public health, the court does not acquire jurisdiction and the proceedings are void. Such objection may be taken by any person owning or possessing lands affected by the proceedings, though none of it is actually taken thereby. (*Id.*)
76. *Semble*, that the doctrine that to entitle the owner of property to protection under the constitutional provision that private property shall not be taken for public use without compensation, the property must actually be taken, and that the owner is not entitled to remuneration for indirect or consequential damages, does not apply to a case in which the attempted exercise of the right of eminent domain, from which the consequential damage results, is not authorized by law. (*Id.*)
77. *Semble*, that a determination by the commissioners that the proposed drainage is necessary "to carry off surface water from farm lands and the highways," will not authorize an order directing the construction of a drain; there must exist a necessity for draining the lands of the petitioners, or the lands described in the petition. (*Id.*)
78. Plaintiff and the defendant, the village of Athens, each claimed to have the exclusive right to run a ferry between the city of Hudson and the village of Athens. In this action, brought by the plaintiff to restrain the defendant from running the said ferry, the complaint alleged that the defendant had diverted business from the plaintiff, to his great loss and damage, but gave no special details thereof. The defendant alleged that no material or irreparable damage was being done to the plaintiff, and that the defendant was abundantly responsible for any probable sum that plaintiff could recover:
Held, that the action was not one in which an injunction *pendente lite* should be granted. (*Power* agt. *Village of Athens*, 19 *Hun*, 165.)
79. On July seventh an order was

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granted restraining the defendants, the village of Athens, and the trustees thereof, from running a ferry from Athens to Hudson. On July eighth the court granted an order, returnable on the tenth, at 10 A. M., at Kingston, requiring the defendant to show cause why they should not be punished for a contempt in violating the injunction. The order was served on the defendants, at Athens, at about noon of July ninth:

Held, that the order did not give the defendant "a reasonable time" within which to show cause, and that the discretion of the justice fixing such time was reviewable at general term. (*Id.*)

80. General Rule No. 21, requiring a non-enumerated motion to be noticed for the first day of the term, unless sufficient cause be shown (and contained in the affidavit served) for noticing it for a later day, is applicable to an order requiring a defendant to show cause why he should not be punished for a contempt in violating an injunction. (*Id.*)

81. An appeal from an order granting a temporary injunction does not supersede or authorize the defendants to disobey it. (*Id.*)

82. Where, however, defendants, in disobeying the injunction, act under the advice of counsel that it is superseded by an appeal taken therefrom, the fine imposed should not exceed the actual damage sustained by the plaintiff, together with his costs and expenses to be taxed under section three of chapter 270 of 1854. (*Id.*)

83. No counsel fee or extra allowance can be granted as part of such costs and expenses. (*Id.*)

84. G. Smith, on October 10, 1866, mortgaged certain premises to one Owens, who, on July 5, 1867, assigned the mortgage to W. Smith, who, on October 1, 1868, assigned

it to the plaintiff. The mortgage was recorded October 15, 1866, and the two assignments February 9, 1877. In February, 1876, Smith applied to one Van Schoonhoven for a loan on the premises; Van Schoonhoven, having searched the records, refused to make the loan unless the Owens mortgage was satisfied, he having no knowledge of its having been assigned. Smith procured a satisfaction piece from Owens, paying nothing therefor, and delivered it to Van Schoonhoven, who recorded it and his mortgage at the same time, February 9, 1876.

In an action by the plaintiff to foreclose the mortgage, *held*, that Van Schoonhoven was protected by the recording act, and that his mortgage was entitled to priority over that of the plaintiff.

After the execution of the Owens mortgage, and before the execution of the one to Van Schoonhoven, and on November 4, 1871, Smith gave a mortgage on the same premises to one Carpenter, which was duly recorded January 3, 1872:

Held, that in distributing the proceeds arising under the sale, there should first be set apart the amount due on the Owens mortgage, and that that amount, or so much thereof as might be necessary, be applied on the mortgage to Van Schoonhoven, and the balance, if any, on the Owens mortgage. The residue of the proceeds of the sale should be first applied on the Carpenter mortgage, and next on the balance remaining due on the Van Schoonhoven mortgage, and lastly, any remaining surplus should be applied on the Owens mortgage. (*Bacon agt. Van Schoonhoven*, 19 Hun, 158.)

85. The complaint in this action alleged that the defendants entered into a contract with the plaintiff to perform certain work upon the canal and furnish material therefor; that the amount to be re-

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ceived by them thereunder was \$74,183.40; that no change or alteration in the plan, or the work to be done, had been lawfully made. It then alleged that the defendants, "under color of said contract, without right, obtained and received moneys owned and belonging, and which now belong, to the state, amounting in the aggregate to the sum of \$417,571. That the said moneys were so obtained and received by the defendants by means of frauds, devices, false pretenses and vouchers, and corrupt combinations and collusions with state officers," and then set forth certain alleged frauds. The referees, before whom the action was tried, found that the contract was let as alleged in the complaint; that the same was unlawful, and without authority, thereafter changed, and the cost of the work largely increased by the removal of a quantity of the slope wall of the canal and the substitution therefor of vertical wall, and that the money paid for such unauthorized work so performed, and the materials furnished therefor, could be recovered back. The report contained no finding, nor was any evidence given, showing fraud on the part of any person, or any imperfection in the work done, or that the work and materials were not worth the amounts paid therefor. The payments had been made as the work progressed upon certificates and estimates of officers of the state:

Held, that the action was in tort, and that as no fraud had been proved, a recovery could not be had on contract. (*People* agt. *Dennison*, 19 *Hun*, 137.)

86. That as the work was done on the property of the state, and as it had received and still retained the benefits thereof, an action would not lie to recover the money paid therefor by officers to whom it had intrusted the supervision and management of the work. (*Id.*)

87. An action to recover upon a policy of insurance, brought after the death of the person insured and the expiration of the time given by the terms of the policy to the company within which to pay it, is an action against a corporation, founded upon an "evidence of debt, for the absolute payment of money," within subdivision 8 of section 791 of the Code of Civil Procedure, and is entitled to a preference upon the calendar. (*Studwell* agt. *Charter Oak Ins. Co.*, 19 *Hun*, 127.)

88. A plaintiff, by failing to file a note of issue in the form prescribed by General Rule No. 36, waives his right to have the case treated as preferred, on the ground that the property of the defendant is held under an attachment. (*Id.*)

89. This action was brought by the plaintiff to recover \$6,615 for two quarters' rent accruing on August 1, and November 1, 1877, on a lease, under seal, given by him to the defendants. Subsequent to its commencement, the plaintiff brought another suit, in another court, against the same defendants, to recover the balance of a quarter's rent, 150, which had fallen due, under the same lease, on February 1, 1877, and recovered a judgment therein, which was paid. Thereupon the defendants put in a supplemental answer, setting up, as one of the defenses, the recovery and payment of the judgment in the second action. Upon an appeal from a judgment entered upon an order sustaining a demurrer to this defense:

Held, that the recovery and payment of the judgment in the second action, though occurring during the pendency of the first, was properly pleaded by a supplemental answer.

That, when pleaded, it constituted a defense thereto. (*Jex* agt. *Jacob*, 19 *Hun*, 105.)

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90. That the judgment sustaining the demurrer should be reversed, without prejudice to an application to vacate the judgment in the second action, and for leave to return to the defendants the money paid upon it, and consolidate both actions, on such terms as might be just. (*Id.*)
91. An order of a county judge, adjudging a party guilty of contempt in violating an injunction contained in an order directing him to appear for examination in supplementary proceedings, involves a substantial right, and is appealable under section 1842 of the Code of Civil Procedure. (*Newell agt. Cutler, 19 Hun, 74.*)
92. A failure to show the party the original order, when serving him with a copy, is a mere irregularity, which is waived by his appearing, without objection, before the referee and submitting to an examination. (*Id.*)
93. Where a party has been served with an order requiring him to appear and be examined in supplementary proceedings, and restraining him from disposing of any of his property, the fact that he has a family wholly supported by his labor will not authorize him to dispose of wages subsequently collected by him, without permission of the court. (*Id.*)
94. In this action, brought by the payee of a joint and several note against the makers thereof, the original plaintiff died and the action was revived by his administrator. The defendants, one of whom had signed the note for the accommodation of the other, moved to sever the action so that they might severally testify in each other's favor, in order to establish the defenses set up in the answer:
Held, that as the defendants could be witnesses for each other to the same extent in the joint ac-
- tion that they could in the two actions into which it was sought to separate it, that no reason existed for granting the application, and that an order of severance should not be granted. (*Hill agt. Alvord, 19 Hun, 77.*)
95. On appeal an order directing the severance of an action is reviewable upon its merits. (*Id.*)
96. August 12, 1872, a judgment was recovered against Edward Wall, as survivor of a firm composed of himself and Robert R. Stevens, on a firm note. The complaint alleged that Wall and Stevens had been partners; that Stevens was dead, and that Wall was the sole survivor. On this judgment an execution was issued and partially collected. In 1878, on notice to Wall, the summons and complaint were amended by adding thereto the names of Malona Stevens, Joel Stevens, 2d, and Annis Stevens, as surviving partners of the said firm. Thereafter a summons was issued requiring the additional defendants to show cause why they should not be bound by the said judgment, entered in 1872, and amended by the order of January 7, 1878:
Held, that the summons was irregularly issued and should be set aside. (*Oryan agt. Wall, 19 Hun, 184.*)
97. A motion for a new trial, on the minutes of the justice before whom the action was tried, can only be made where a verdict has been rendered; it cannot be made where the plaintiff has been nonsuited. (*Van Doren agt. Horton, 19 Hun, 7.*)
98. On January 14, 1854, there was filed in the office of the town clerk of the town of Penfield an instrument in writing, bearing date January 2, 1854, signed by the sole commissioner of highways, ordering the laying out of a highway therein, "upon the ap-

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plication of Samuel Strowger, and passing through the improved lands of said Strowger and others, who have consented thereto; said road commences on the five mile line at Alpheus S. Chark's southeast corner; thence running westerly to the Drew farm, and between Ichabod Leonard, Jr.'s, land and William R. Thomas' land, twenty-six rods, according to the survey thereof." The order was recorded in the book of town records, and on the same day, and on the following successive pages of the same book, were recorded an instrument under seal, reciting the laying out of the same highway on April 9, 1853, by which the owners of the lands through which it passed released their claims for damages, and also a survey of the said highway, dated April 9, 1853, and signed by the said Strowger:

Held, that the surrounding circumstances sufficiently identified the survey, dated April 9, 1853, as the one referred to in the order of the commissioner, and that the statute requiring the survey to be incorporated in the order was substantially complied with. (*McCarthy agt. Whalen*, 19 Hun, 568.)

99. That the release signed by the owners sufficiently showed their consent to the laying out of the highway. (*Id.*)

100. It is not necessary to the valid laying out of a highway that there should have been a written application therefor; the commissioner may act of his own motion. (*Id.*)

101. This action was brought against the defendants, Ezra Jones, Burrall Spencer, Samuel M. Spencer and Jarvis Lord, as joint payees and indorsers of a promissory note, discounted by the plaintiff. The summons and complaint were personally served on Jones, and on Burrall Spencer and Samuel M. Spencer on May 7, 1878, and on Lord sometime before May 29,

1879. Samuel M. Spencer served an answer alleging that his indorsement on the note was forged by Burrall Spencer. On May 29, 1878, judgment by default was entered against Jones and Burrall Spencer. The issue raised by Samuel M. Spencer's answer is still pending. Burrall Spencer had notice of the entry of judgment against him on June 7, 1878, and subsequently used the judgment roll for the purpose of establishing a defense interposed by him in an action of foreclosure, to which all the parties to this action were parties. On May 9, 1879, Burrall Spencer noticed a motion, to be heard May 27, 1879, to set aside the judgment against him for certain irregularities which were specified in his notice:

Held, that the court below, in its discretion, properly denied the motion, and that an order to that effect should be affirmed. (*National Bank agt. Spencer*, 19 Hun, 569.)

102. The power of the supreme court to allow a judgment to be entered against one joint debtor, on his failure to appear and answer, while an issue raised by the answer of another joint debtor is still pending, considered. (*Id.*)

103. Defendant's father dies, leaving a will, by which he devised to his trustees, among other property, a house and lot in Rochester, in trust to give to the defendant "the free and unrestrained use, occupation and possession thereof during the term of her natural life only," and on her death to convey it to her children in fee. He also directed the trustees to pay to his widow a specified amount out of the income to arise from certain personal securities, and to divide any surplus of such income among his children, and on the widow's death, to pay each daughter then living the income of a certain share of the estate during her life. The widow was still living, and

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in possession of the house and lot, and it was not shown that there was any surplus income to divide.

The order appealed from required the defendant to transfer to a receiver appointed in supplementary proceedings, all her interest in said house and lot and all her right, title and interest, in possession and expectancy, of, in and to the annual income arising from the personal property:

Held, that so far as it required the transfer of any legal estate she might have in the real estate it was unnecessary, as all her alienable interest therein vested in the receiver on his appointment and the filing and recording of his bond and the order appointing him. (*Manning* agt. *Evans*, 19 *Hun*, 500.)

104. That so far as any beneficial interest she might have in the rents and profits of the land, or the income of the personal property was concerned, only so much thereof could be reached as was unnecessary for her support, and that only in a direct action for that purpose. (*Id.*)

105. The defendant was a foreign corporation, organized under the laws of California and having its office and place of business in that state; it had a president, secretary and treasurer, all of whom resided there; it had no place of business in New York, except a branch office, at which its stock could be transferred and assessments be received for transmission to California; one Brumagim was employed to take charge of this office, and to transfer stock and receive and transmit assessments, as directed by the defendant's officers. He had nothing to do with the general business of the company or with its books and papers:

Held, that he was not "a managing agent of the corporation" under subdivision 3 of section 433 of the Code of Civil Procedure,

authorizing service of the summons upon the corporation by the delivery thereof to a managing agent of the corporation. (*Reddington* agt. *Mariposa L. and M. Co.*, 19 *Hun*, 405.)

106. The term "managing agent," as therein used, means one who is invested with general powers involving the exercise of judgment and discretion, as opposed to an ordinary agent, who acts in an inferior capacity and under the direction and control of superior authority, both in regard to the extent of the work and the manner of executing it. (*Id.*)

107. In 1864 one Monarque died, leaving a will, by which he devised certain real estate to his wife for life, and, on her death, to his four children, for their lives, and after their death to their respective children in fee. In 1876, one of the children of the testator brought an action in the supreme court for the construction of the will, alleging certain portions thereof to be invalid. The widow, who was also the executrix, the other three children, and all the grandchildren, were parties, the adults appearing by attorneys and the infants by guardians *ad litem*, duly appointed. In this action it was adjudged that certain portions of the will were invalid, and that the fee vested in the three children of the testator, subject to the life estate of the widow, and that the grandchildren had no interest therein. Subsequently the present action was brought to partition the real estate, the widow and children being made parties, but not the grandchildren. Upon a motion to compel purchasers, who had bought at a sale under a decree herein, to complete their purchases:

Held, that the supreme court had jurisdiction of the action brought to procure a construction of the will. (*Monarque* agt. *Monarque*, 19 *Hun*, 332.)

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106. That, as no objection was made to its hearing and deciding the same, the parties thereto, including the infant grandchildren, were bound by the decree, even though it were erroneous, and whether the case was one in which a court of equity was called on to exercise its powers or not. (*Id.*)
109. That, as the grandchildren were thereby adjudged to have no interest in the land, they were not necessary parties to an action for its partition (*Id.*)
110. That the purchasers should be compelled to complete their purchase. (*Id.*)
111. An order of a county court dismissing an appeal from a justices' court, on the ground that the notice of appeal was defective, is appealable to the general term, under section 1342 of the Code of Civil Procedure. (*Andrews* agt. *Long*, 19 *Hbh.*, 803.)
112. A notice of appeal by a plaintiff from a judgment of a justices' court, in favor of the defendant, stating that the judgment was rendered upon an issue of fact; that the claim in litigation was for more than fifty dollars, and that the judgment was rendered contrary to the evidence on the trial, sufficiently states the grounds of appeal. (*Id.*)
113. Where a notice of appeal from the judgment of a justices' court was signed, "John Andrews, plaintiff's attorney," and there was nothing in the case showing his authority to appear for the appellant, *held*, that it was insufficient. (*Id.*)
114. The sureties to a bond, given by a non-resident executor, are proper parties defendant to an action brought to procure his removal on the ground of mismanagement, and to compel him to account for and pay over any money in his hands. (*Hood* agt. *Hood*, 19 *Hun.*, 800.)
115. Where, upon the trial of an action, brought by a legatee and next of kin, to procure the removal of an executor, and compel him to account, it appears that the plaintiff has assigned his interest in the estate as security for a debt, the court may direct the party holding it as security to be brought in as a defendant. (*Id.*)
116. Legatees under a will may enforce a bond given by a non-resident executor, though not parties to it. (*Id.*)
117. An accounting before the surrogate is absolutely void as to heirs and next of kin not notified thereof. (*Id.*)
118. The bond required to be given by a non-resident executor covers the proceeds of real estate received by him, on sales made under the will or by order of the surrogate. (*Id.*)
119. In July, 1864, plaintiff recovered a judgment against one Whitbeck for the possession of certain real property. Whitbeck appealed to the general term, and to stay proceedings, gave an undertaking, signed by the defendant Simmons, by which the latter agreed, among things, "that during the possession of such property by the appellant, he will not commit, nor suffer to be committed, any waste thereon." The judgment was affirmed September 28, 1865, and Whitbeck, six days thereafter, appealed to the court of appeals, giving an undertaking, with other sureties, to stay proceedings. In January, 1867, the judgment was affirmed by the court of appeals. In the winter of 1866 and 1867, Whitbeck committed waste upon the property. In an action to recover the damages occasioned thereby: *Held*, that Simmons was not lia-

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ble therefor, that his liability became fixed upon the giving of the undertaking upon the appeal to the court of appeals, and could not be affected by any subsequent acts of Whitbeck. (*Church* agt. *Simmons*, 19 *Hun*, 220.)

120. In September, 1876, the plaintiff attempted to commence an action against the defendants herein, but by mistake omitted to state the proper name of one of the defendants in the summons and complaint served. Subsequently, on motion of the attorney for the other defendant, an order was made setting aside the complaint with ten dollars costs, directing the summons to be amended by adding the name of the defendant improperly named and allowing the plaintiff to serve an amended complaint and a copy of the amended summons within ten days, upon payment of ten dollars costs. The plaintiff did not pay the ten dollars costs, or serve the amended summons and complaint, though more than ten days elapsed since he was served with notice of the entry of the order. This action was brought against the same defendants for the same cause of action stated in the former complaint:

Held, that the former action was not pending at the time of the commencement of the second action so as to prevent the prosecution of the latter. (*Owens* agt. *Loomis*, 19 *Hun*, 606.)

121. In an action brought to foreclose a mortgage, an infant defendant applied for and procured the appointment of a guardian *ad litem*, who put in the general answer. Subsequently, and before the expiration of twenty days from his appointment, the action was tried and judgment rendered in favor of the plaintiff, the guardian appearing and making no objection thereto:

Held, that the judgment was regular; that section 1218 of the

Code of Civil Procedure, requiring twenty days to elapse between the appointment of the guardian and the entry of judgment, only applied where the judgment was entered by default. (*Newins* agt. *Baird*, 19 *Hun*, 806.)

122. Causes of action on different contracts cannot be joined in the same action, unless all parties are affected by each. (*Nichols* agt. *Drew*, 19 *Hun*, 490.)

123. *Seemle*, that where a creditor has, by false and fraudulent representations as to the pecuniary responsibility of his debtor, made to him by a third person, been induced to assign his claim to such third person for less than its face, and it appears that such representations were made and such assignment procured by a fraudulent contrivance between the assignee and the debtor, the money paid upon the same being furnished by the latter, the creditor may treat the money paid for the assignment as a part payment upon the debt, and without returning it seek in the same action to set aside the fraudulent assignment and recover the balance of the debt. (*Id.*)

124. The firm of Haas, Pike & Co. transferred all its property, real and personal, to S. N. Pike, one of the partners, upon the agreement that he should sell the property, pay the firm debts from the proceeds thereof, and divide what might remain between the plaintiff and himself. Pike died in possession of the firm property, leaving a will by which he devised his estate to the defendants, in trust, to manage the same and apply the profits thereof to the use of his children until the youngest should become of age, and then to divide the same equally among them. After all the children had come of age, the plaintiff brought this action against the defendants, as executors and trustees, to com-

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pel them to account for the property received by their testator from the firm, and to pay to plaintiff his share thereof. One of the children applied to be made a party to the action, to enable him to protect his interest in the estate:

Held, that the application should have been granted. (*Haas* agt. *Craighead*, 19 *Hun*, 396.)

125. In 1877, the plaintiffs sued Silliman & Co. for \$12,000, upon various drafts and notes made by that firm, among which was a note for \$2,500, made by that firm to the order of, and indorsed by the defendant Marks, upon which plaintiffs claimed there had been paid but \$122. Silliman & Co. answered, denying that anything was due to the plaintiff on the note, and averring that it was made and given to the plaintiffs as collateral to claims, which had subsequently been paid. The firm also offered to allow judgment to be taken against them, under section 738 of the Code of Civil Procedure, for the amount claimed in the complaint, after deducting that note, which offer was accepted by the plaintiff, and judgment was entered accordingly. Subsequently, the plaintiffs brought this action upon the same note against the defendant Marks, who had indorsed it: •

Held, that this action was barred by the judgment entered in the former action. (*Robinson* agt. *Marks*, 19 *Hun*, 325.)

126. In an action involving conflicting claims to the proceeds of property sold, the referee filed his report in favor of one of the defendants, but failed to decide whether certain of the defendants were entitled to costs. Upon defendants giving notice of a motion before the referee, to decide this question, the plaintiffs served a notice that they elected to terminate the reference, as more than sixty days had elapsed since the

original submission. Subsequently, on motion of the defendants at special term, an order was made sending the case back to the referee, in order that he might pass upon this question. On an appeal from this order, *held*, that it was proper, and should be affirmed. (*Parker* agt. *Baxter*, 19 *Hun*, 410.)

127. The defendant was a proprietor of a school, the tuition fees in which were payable quarterly in advance, one quarter commencing February third. On that day supplementary proceedings were instituted against him, and on March eighth a receiver was appointed therein. The quarter fees amounted to about \$600. After the commencement of the proceedings, and before the appointment of the receiver, the defendant had collected and used some \$220. This application was made to restrain the receiver from collecting the balance of the accounts due for the quarter, on the ground that they were exempt from execution as personal earnings of the debtor necessary for the support of his family:

Held, that such application should be granted. (*Miller* agt. *Hooper*, 19 *Hun*, 394.)

128. An affidavit, used on an application for an attachment, which fails to state that a certain sum is due to the plaintiff "over and above all counter-claims known to him," as required by subdivision 1 of section 636 of the Code of Civil Procedure, is fatally defective, and an attachment granted thereon will be set aside. (*Lyon* agt. *Blakeley*, 19 *Hun*, 299.)

129. When a special proceeding is pending before a county court, the county judge whereof is disqualified from acting, he cannot make an order directing it to be continued before a justice of the supreme court, but should make and file with the county clerk a

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certificate of the fact of his disqualification

A proceeding pending in the county court cannot be continued before a justice of the supreme court, but must be removed into the supreme court. (*Matter of Village of Rhinebeck*, 19 Hun, 846.)

180. After this action had been tried, and a verdict rendered for the plaintiff, and before entry of judgment it was discovered that the judge was disqualified, being one of the executors of an estate holding stock in the defendant corporation. The action was retried before another judge, and the plaintiff again recovered a verdict:

Held, that the plaintiff was entitled to tax costs for two trials. (*Oregin agt. Brooklyn Crostown R. R. Co.*, 19 Hun, 849.)

181. On an appeal from a decision of the commissioners of highways refusing to lay out a highway, the referees reversed such decision, and ordered a highway to be laid out "beginning at the highway leading from North Hoosic to Hoosic Falls, at a point near the old Chase garden, and nearly opposite the tenement house owned by S. S. Stevens, running in a westerly direction to the Troy and Bennington railroad, and, crossing the same, runs parallel to and with said railroad to Hoosic Junction:"

Held, that the order was erroneous, and should be reversed, for uncertainty in the description of the highway directed to be laid out. (*People ex rel. Waters agt. Diner*, 19 Hun, 263.)

182. The supreme court of this state has jurisdiction of an action, brought therein by an assignee in bankruptcy, to recover a debt paid to the defendant by the bankrupt within four months of the filing of the petition in bankruptcy. (*Tyler agt. McCollum*, 19 Hun, 622.)

183. An order made at general term reversing a judgment entered upon the report of a referee, and granting a new trial, does not, of itself, vacate the order of reference already granted. The reference can only be vacated by an express direction entered in the order of reversal, or by an order made at the special term upon a motion therefor. (*Catlin agt. Adirondack Co.*, 19 Hun, 389.)

184. Where, after a decree in foreclosure, and a sale thereunder, plaintiff, on discovering that a person liable to pay the mortgage debt has not been made a defendant, applies at special term for leave to bring him in and to file a supplemental summons and complaint, notice of such application need not be given to him. (*Ebbets agt. Martine*, 19 Hun, 294.)

185. Where a referee, to whom a disputed claim against an estate has been referred, under the statute, reports to the court that such claim is wholly unfounded, the court may, on the application of the executor, direct the referee to report upon any claim in favor of the estate and against the claimant. (*Matter of Hendrickson agt. Dickson*, 19 Hun, 290.)

186. A husband may maintain an action at law against his wife to recover property, belonging to him, which has been forcibly seized and carried away by her, under a claim that it belonged to her and not to her husband. (*Berdell agt. Parkhurst*, 19 Hun, 353.)

187. The willful refusal of a receiver to obey an order of the court, requiring a payment by him out of funds in his hands as receiver, is a disobedience by a person "appointed to perform * * * ministerial services" of a lawful order of the court, and a misdemeanor in his office, and willful neglect of duty therein within the meaning of section 1 of that

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portion of the Revised Statutes relating to "proceedings as for contempt" (2 R. S., 584, sec. 1, sub. 1); it does not come within the fourth section (2 R. S., 585, sec. 4) authorizing the issuing of a precept without notice to commit a person disobeying an order "made for the payment of costs or any other sum of money." (*Clark agt. Binsinger*, 75 N. Y., 844.)

138. It is therefore proper practice in such case for the court to grant an order for the receiver to show cause "why he should not be punished for the alleged misconduct" (2 R. S., 585, sec. 5). (*Id.*)

139. The receiver must have an opportunity to be heard, and there must be an adjudication that he was guilty of the misconduct, before he can be punished. (*Id.*)

140. Where the allegations of the complaint in an action are put at issue by the answer, and upon the trial are found in favor of plaintiff; but judgment is rendered thereon in favor of defendant, it is error for the general term upon reversal of the judgment to direct judgment for plaintiff; a new trial should be ordered. Defendant having obtained judgment is not called upon to except to the findings, or to insert the evidence in the case to show that they were controverted. (*Ehrichs agt. De Mill*, 75 N. Y., 870.)

141. A general exception to all of a charge, upon a particular point, is unavailable here when a portion of the charge is correct; the attention of the court must be called to the erroneous portions. (*Arnold agt. People*, 75 N. Y., 603.)

PREFERRED CAUSES.

1. An action to recover upon a policy of insurance, brought after the death of the person insured

and the expiration of the time given by the terms of the policy to the company within which to pay it, is an action against a corporation, founded upon an "evidence of debt, for the absolute payment of money," within subdivision 8 of section 791 of the Code of Civil Procedure, and is entitled to a preference upon the calendar. (*Studwell agt. Charter Oak Ins. Co.*, 19 Hun, 127.)

2. A plaintiff by failing to file a note of issue in the form prescribed by General Rule No. 86, waives his right to have the case treated as preferred, on the ground that the property of the defendant is held under an attachment. (*Id.*)

RAILROADS.

1. Where a railroad corporation desires to cross or intersect the railroad and grounds of another company, and they cannot agree upon a compensation or mode of crossing, upon a petition showing such facts, which are undenied, the petitioners are entitled to an order for the appointment of commissioners to determine the points and manner of crossing (*Laws of 1850, chap. 140, sec. 28, subd. 6*). (*Boston, Hoosic Tunnel and W. R. R. Co. agt. Troy and Boston R. R. Co.*, ante, 167.)

2. If the objection to such application be that the need of a crossing may be avoided by another location, proceedings should be taken under section 22 of the railroad act to change the route. (*Id.*)

3. The language of the statute is, that the commissioners shall decide "the point and manner" of the crossing, thus necessarily committing some discretion to them as to the spot of the crossing and the mode of its accomplishment. (*Id.*)

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REAL ESTATE.

See BROKERAGE.

Lynch agt. *McKenna*, ante, 42.

RECEIVER.

1. The general rule of law is that where a statute requires something to be done, and there is no specification of the time of performance, the duty required becomes a present one to be immediately performed. (*Attorney-General* agt. *North American Insurance Company*, ante, 197.)
2. Accordingly, *held*, that a receiver of an insolvent insurance company, appointed pursuant to chapter 902 of the Laws of 1869, when the securities of such company are converted into money, is entitled to the immediate possession of the same; and the superintendent of insurance cannot retain the moneys until the receiver is ready to distribute, but must pay them over to the receiver at once. (*Id.*)
3. In an action for a dissolution of a copartnership, it is almost a matter of course to grant an injunction and appoint a receiver. (*McEneros* agt. *Decker*, ante, 250.)
4. Although irregular for a receiver in supplementary proceedings to employ, on his behalf, the attorney for the judgment creditor in the action, yet where there are two or more defendants all must join in the application to set aside the summons and complaint for such irregularity. (*Baker* agt. *Van Epps*, ante, 401.)
5. Receivers appointed in another state and operating a railway as such receivers, but having property in their hands as such receivers in this state, cannot be sued in the courts of this state and an attachment issued in such suit will be vacated. (*Külmer* agt. *Hobart and another*, ante, 452.)
6. In supplementary proceedings, takes all alienable interest in real estate of debtor without transfer of any legal estate, by him to receiver, but not beneficial interest under trust in rents and profits of land or income of personal property without direct action by receiver for that purpose and then only so much thereof as not necessary for support of *cestui que trust*. (*Manning* agt. *Evans*, 19 Hun, 500.)
7. In an action for partition by a receiver appointed in supplementary proceedings, the complaint alleged in substance that by an order duly made May 22, 1876, by the county judge of U. county in such proceedings, plaintiff was appointed receiver, &c., that such order was recorded in said county, that the real estate was situate therein, and that the judgment debtor acquired title on or about April 23, 1876. There was no allegation that the judgment roll was filed or that the judgment debtor resided in that county, or that the order or a certified copy thereof was filed and recorded in the office of the clerk of the county where the judgment roll was filed or where the judgment debtor did reside:
Held, that a demurrer to the complaint was properly sustained, as the conditions prescribed by the Code (*old Code*, sec. 293), which must exist before title to real estate vests in the receiver, did not appear. (*Dubois* agt. *Cassidy*, 75 N. Y., 298.)
8. Also, that plaintiff by virtue of his appointment only became vested with such property as the judgment debtor had at the time of the commencement of the proceedings, and there was no allegation that he owned the real estate at that time; but a proper inference from the facts alleged was that he acquired title after that time. (*Id.*)
9. As to whether a receiver appoint-

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- ed in such proceedings obtains such a title to real estate as will enable him to maintain an action for partition, *quare*. (*Id.*)
10. The willful refusal of a receiver to obey an order of the court, requiring a payment by him out of funds in his hands as receiver, is a disobedience by a person "appointed to perform * * * ministerial services" of a lawful order of the court, and a misdemeanor in his office and willful neglect of duty therein within the meaning of section 1 of that portion of the Revised Statutes relating to "proceedings as for contempt" (2 R. S., 534, sec. 1, sub. 1); it does not come within the fourth section (2 R. S., 535, sec. 4) authorizing the issuing of a precept without notice to commit a person disobeying an order "made for the payment of costs or any other sum of money." (*Clark agt. Bvinger*, 75 N. Y., 344.)
11. It is therefore proper practice in such case for the court to grant an order for the receiver to show cause "why he should not be punished for the alleged misconduct" (2 R. S., 535, sec. 5). (*Id.*)
12. The receiver must have an opportunity to be heard, and there must be an adjudication that he was guilty of the misconduct, before he can be punished. (*Id.*)
13. Where, in proceedings upon an order to show cause the receiver is adjudged guilty of the alleged misconduct, this court cannot upon appeal therefrom review the order directing the payment; the supreme court has power to direct its receiver as to the disposition of funds in his hands, and its order to that effect, if not appealed from, must be obeyed whether correct or not; the propriety of the exercise of the power cannot be considered on such an appeal. (*Id.*)
14. Where it appears that a receiver has funds in his hands sufficient to satisfy a lien thereon and willfully refuses on demand to obey an order of the court directing him to pay such lien, it is a justifiable inference that such conduct impedes, impairs and defeats the rights and remedies of the lienor to the extent of the lien; and upon an adjudication to that effect a fine may be imposed upon the receiver to the amount of the lien (2 R. S., 538, secs. 20, 21), and the power of the court is not limited to a fine of \$250 with "costs and expenses" (sec. 22). (*Id.*)
15. It is not necessary that the order imposing the fine should in form adjudge that actual loss or injury has been sustained to the amount of the fine; it is sufficient if it appears that such loss has been suffered. (*Id.*)
16. Nor is it essential to show that the loss or injury is irremediable and hopeless. (*Id.*)
17. After the granting of an order fining B., a receiver, the amount of a lien upon the fund in his hands, because of willful disobedience of an order requiring him to pay such lien, and directing his imprisonment until he paid it, an order was granted forbidding K., the receiver of a savings bank, in which bank B. had deposited a portion of the fund, from paying over to B. any part of said fund so deposited by him, and directing K. to pay all dividends thereon to T., the lienor:
Held, that the order should be modified by inserting a clause that all moneys paid by K. to T. should be applied in reduction of the fine imposed upon B., and that B. upon showing any sum in the hands of K., as such receiver, belonging to the fund and payable to B., may have that sum applied to the reduction of his fine. (*Id.*)
18. Where, in a copartnership agree-

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ment no time is named for its continuance, and no provision made for the settlement of its concerns upon dissolution, it is dissolvable at the will of either of the partners; an action is maintainable for that purpose, and the appointment of a receiver therein is proper. (*McElroy* agt. *Lewis*, 76 N. Y., 878.)

RECORD.

1. This court has no power to amend a record of the supreme court; any amendment must be sought in that court. (*Kenyon* agt. *N. Y. C. and H. R. R. Co.*, 76 N. Y., 607.)

RECORDING ACT.

1. Where in a controversy as to title to lands, both parties claim from a common source, the one claiming under a deed to A., first executed but not recorded until after the record of a deed to B., under which the other party claims, the fact that a conveyance from A. was recorded before the deed to B., is immaterial; if the deed to B. has the priority over A.'s deed by reason of its earlier record, no title valid as against it could be derived from A. (*Page* agt. *Waring*, 76 N. Y., 463.)
2. So, also, it is immaterial that the deed to A. was recorded prior to a conveyance from B., or from his grantee, as, if B. had good title under the recording act, those taking title under him are also protected. (*Id.*)
3. The possession which will constitute constructive notice of an unrecorded deed to a subsequent purchaser must be under the deed, and actual, open and visible, so that the subsequent purchaser could have gone upon the land and obtained by inquiry information of such deed. (*Id.*)

REFEREES.

1. A referee is not obliged to give up his report until his fees have been paid. (*Fischer* agt. *Raab et al.*, *ante*, 221.)
2. It is the practice now, as it has always been the practice of the court of chancery, for the court to compel obedience to its orders, by process of contempt. (*Id.*)
3. The act of 1847 has abolished the collection of interlocutory costs, by process of contempt. (*Id.*)
4. Referee's fees are not costs. (*Id.*)
5. An order for the payment of moneys not collectible by execution, may, under the existing law, be enforced by process of contempt. (*Id.*)
6. Rules of practice rest upon considerations of fairness no less than upon convenience. A person called upon to pay money should have presented to him evidence that the person who demands it has authority to receive it; and, for this reason, a demand for interlocutory costs should be made only by the party entitled to them, or by some person authorized by him to collect the money, and it is not necessary for the party upon whom the demand is made to require the exhibition of the authority. (*Id.*)
7. A demand for the payment of referee's fees must be made personally, and the authority of the person making the demand must be shown. (*Id.*)
8. Where bad faith is manifested by an appellant and his attorney throughout a proceeding, costs of appeal will not be allowed, and where a stipulation is required by the court as part of the terms of the reversal of an order or judgment, and the party elects

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or refuses to stipulate the order or judgment appealed from will be affirmed, *with costs*. (*Id.*)

9. In proceedings to distribute surplus moneys a question of fraud may be investigated before the referee, and every question may be examined tending to show the equities of the claimants. (*Tator agt. Adams, ante, 355.*)

10. Referees making sales in partition are to be allowed the same commissions prescribed by law for executors and administrators (*Laws of 1869, vol. 2, p. 1878, sec. 4*), viz.: For receiving and paying out all sums of money not exceeding \$1,000, at the rate of five dollars per cent; for receiving and paying out any sums exceeding \$1,000, and not amounting to \$10,000, at the rate of two dollars and fifty cents per cent; for all sums above \$10,000 at the rate of one dollar per cent (8 R. S. [6th ed.], 101, sec. 71). (*Strauss agt. Hellman, ante, 377.*)

11. The commission is provided as a compensation for both receiving and paying out the money, and for that alone. (*Id.*)

12. Where a referee, who was appointed to make a sale in partition, sold the property subject to certain mortgages, the purchase-money actually paid being \$7,650, while the mortgages, subject to which the property was sold, appear in the aggregate to have been \$16,500:

Held, that he could only charge commissions on the amount actually paid; he could not charge commissions for the amount of the mortgages subject to which the property was sold. (*Id.*)

REFERENCE.

1. A reference should not be ordered where the issue is properly upon an agreement and its per-

formance, although upon the issue of performance the plaintiff may be called upon to prove the payment of many items of expense, as he cannot recover upon them. (*Keep agt. Keep, ante, 189.*)

2. Where there is an important question of fact to be determined before the matter of the account will become one of importance, a reference should not be ordered. (*Id.*)

3. So long as there is an issue framed by the pleadings, in an action for a divorce, there can be no reference. (*McCrea agt. McCrea, ante, 220.*)

4. In an action involving conflicting claims to the proceeds of property sold, the referee filed his report in favor of one of the defendants, but failed to decide whether certain of the defendants were entitled to costs. Upon defendants giving notice of a motion before the referee, to decide this question, the plaintiffs served a notice that they elected to terminate the reference, as more than sixty days had elapsed since the original submission. Subsequently, on motion of the defendants at special term, an order was made sending the case back to the referee, in order that he might pass upon this question.

On appeal from this order, *held*, that it was proper, and should be affirmed. (*Parker agt. Baxter, 19 Hun, 410.*)

5. An order made at general term reversing a judgment entered upon the report of a referee, and granting a new trial, does not, of itself, vacate the order of reference already granted. The reference can only be vacated by an express direction entered in the order of reversal, or by an order made at the special term upon a motion therefor. (*Cattin agt. Adirondack Co., 19 Hun, 389.*)

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6. Where a referee, to whom a disputed claim against an estate has been referred, under the statute, reports to the court that such claim is wholly unfounded, the court may, on the application of the executor, direct the referee to report upon any claim in favor of the estate and against the claimant. (*Matter of Hendrickson* agt. *Dickson*, 19 *Hun*, 290.)
7. Under the provisions of the old Code (sec. 272) giving to a referee the same power as the court to allow amendments to pleadings on trial, a referee had power on application to amend the complaint on trial (not simply so as to conform it to the proof, but by inserting material allegations as to which no proof had been given), to impose as a condition to the granting of the application that defendant be permitted to answer or demur to the amended complaint. (*Smith* agt. *Rathbun*, 75 *N. Y.*, 122.)
8. Where such a condition was imposed and plaintiff availed himself of that portion of the order of the referee which allowed him to amend, and defendant interposed a demurrer to the amended complaint, *held*, that plaintiff having taken the benefit of the order was precluded from questioning the power of the referee to authorize the demurrer. (*Id.*)
9. Where a referee appointed to sell under a foreclosure judgment, at the request of the purchaser and for his accommodation, applies the sums received on the sale in different order from that directed in and by the judgment, the purchaser cannot be heard to complain of the referee's action. (*Easton* agt. *Pickersgill*, 75 *N. Y.*, 599.)
10. The provision of the act of 1869 (sec. 4, chap. 569, *Laws of 1869*), entitled "An act in relation to the fees of sheriff of the city and county of New York, and to the fees of referees on sales in partition cases," which fixes the fees of referees, on partition sales, is not local, but public, and is not affected by the fact that certain local provisions of the act are violative of the constitutional provision (art. 16, sec. 3) prohibiting the passage of a private or local bill containing more than one subject, and requiring that to be expressed in the title. (*Richards* agt. *Richards*, 76 *N. Y.*, 186.)
11. Under said provision, the referee is entitled to the commissions there provided, and also to the fees specified in section 2 of the act. (*Id.*)
12. A general finding of a referee is contradicted by a special finding of fact. (*Bennett* agt. *Buchak*, 76 *N. Y.*, 386.)
13. An order of reference to ascertain the damages sustained by defendant, by reason of an injunction, recoverable upon an undertaking given under the Code of Procedure (old Code, sec. 232) cannot be granted until it has been determined by judgment or other decision of the court that plaintiff was not entitled to the injunction; it is not sufficient that this appears by the facts developed upon the trial. (*Benedict* agt. *Benedict*, 76 *N. Y.*, 600.)

REGISTER (OF NEW YORK).

1. The register of the city of New York is liable for all errors, inaccuracies or mistakes made in a return, where the usual requisition has been made at his office for a certificate of search. (*Van Schaick* agt. *Sigel*, ante, 211.)
2. Where the usual requisition was made at the register's office for a certificate of search, which was returned, showing that the premises in question were clear of incumbrance, and relying upon this

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the loan was effected and the mortgage was recorded, and it was afterwards ascertained that a prior mortgage had been executed on the same premises. Upon foreclosure there was a surplus of \$1,506.11. Plaintiff seeks to recover the amount of his loan from the register, because of the latter's neglect in returning in the search the prior mortgage. The search was made and certificate signed by a deputy. The defendant's liability is based upon the act of July 21, 1873, in relation to the office of register and the defendant claims exemption from liability on the ground that it is one for tort, and that he cannot be held personally liable as the certificate was not signed by him personally:

Held, that, by the act the register was authorized to appoint and pay a deputy who became his agent for the performance of the duties of the office. Such appointees, are in no sense public officers within the meaning of the statute, they being hired or discharged by the register at will, and the clear intent of the statute is not to absolve the register from any liability arising under its provision.

Held, also, that, although the plaintiff in making his requisition at the register's office for a certificate of search designated the clerk whom he desired should make the search, he did not become the agent of the plaintiff. It was only a request and not an employment by the plaintiff, the defendant having control of his office. It was a mere matter of accommodation to the plaintiff that a man of experience should be allowed to make the search.

Held, further, that the plaintiff was not bound to make the search personally, but had the right to rely upon the official certificate of a public officer designated by law to perform the services, and the register is liable for any loss which was the direct and immedi-

ate result of negligence or error of the register, that is, the impairment of the value of plaintiff's security by means of his neglect. (*Id.*)

RELEASE.

See MORTGAGE.

Kendall agt. *Niebuhr*, ante, 156.

RELIGIOUS CORPORATIONS.

See BURIAL PLOTS.

The People ex rel. Coppers agt. *Trustees of St. Patrick's Cathedral*, ante, 56.

REMOVAL OF CAUSES.

1. An action pending in a state court against an alien defendant cannot be removed into the United States circuit court for trial, under the acts of congress, upon the ground of such alienage, if the plaintiff be also an alien. (*Barrowcliffe* agt. *La Caisse Generale*, ante, 131.)
2. For the purpose of federal cognizance a corporation created under the laws of the republic of France is an alien. (*Id.*)
3. A suit by a corporation created by the United States, is a suit arising under the laws of the United States and may be removed under section 2 of the act of March 3, 1875 (18 U. S. Stat. at Large, 570). (*Union Pacific Railroad Company* agt. *McComb*, ante, 478.)
4. The mere allegation in the complaint that the plaintiff is a corporation created by act of congress, shows that the suit is one arising under the laws of the United States. (*Id.*)
5. A petition to remove a cause from a state court into the United States circuit court, which simply states that defendant was an alien

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at the time of signing and verifying the petition, is fatally defective; it must appear that he was an alien at the time of the commencement of the action. (*Tugman agt. Nat'l S. S. Co.*, 76 N. Y., 207.)

6. Where, after a denial of an application to remove a cause, defendant consents to the appointment of a referee to determine the action, and proceeds to trial on the merits before him, as to whether this is a waiver on the part of defendant of his right to insist that a removal has been had, *quære*. (*Id.*)

REPUGNANCY.

See WILL.

Brown agt. Cleveland, ante, 298.

REVOCATION.

See WILL.

Matter of Dowd, ante, 107.

RIGHT OF WAY.

1. Where the owner of two or more tenements sells one of them, or the owners of an entire estate sells a portion, the purchaser takes the tenement or the portion sold, with all the benefits which appear at the time of the sale to belong to it, as between it and the property which the vendor retains. (*Outerbridge and Scott agt. Phelps*, ante, 77.)
2. But no burden or servitude can be imposed by the vendor upon the tenement or portion sold, in favor of the property retained by him in derogation of his grant, without a reservation expressed in the grant, unless an apparent sign of servitude exists on the part of the tenement or portion sold, in favor of the property retained and the easement claimed is *strictly necessary* to the enjoy-

ment of the property retained. (*Id.*)

3. In the latter case visibility and strict necessity must both concur, as in the case of a party wall, and especially in the case of a claim of right of way. (*Id.*)
4. The right of way from necessity over the lands of another is always of *strict necessity*, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That the way through his own land is too steep or too narrow, does not alter the case. It is only where there is no way through his own land that the right of way can exist. That a person claiming a way of necessity has already one way, is a good plea and bars the plaintiff. (*Id.*)

RULES.

1. A notice of the entry of judgment, which is not indorsed or subscribed both with the name of the attorney and his office address or place of business, as required by the general rules of practice (*Rule 3*), is irregular and ineffectual to limit the time for appealing. (*Kelly agt. Sheehan*, 76 N. Y., 826.)

SALE.

1. One purchasing in good faith, at a sheriff's sale, under execution, goods in the possession of the judgment debtor, is not liable to an action brought by the true owner to recover the goods, or their value, until a demand therefor has been made and refused. (*Ransley agt. Brown*, 18 Hun, 456.)

(SERVICE), AND PROOF OF.

1. Upon the thirtieth day after the granting of a warrant of attach-

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ment, an order for the publication of the summons in this action was obtained, and it was published on the same day in one of the papers designated; it was delivered upon the same day to the other paper, but was not published until the next day. Copies of the summons and complaint were mailed to the defendants, as directed in the order, on the day it was granted:

Held (RAPALLO, MILLER and EARL, JJ., dissenting), that the publication of the summons was not commenced within thirty days after the granting of the attachment, within the meaning of section 638 of the Code of Civil Procedure (*new Code*); and that the attachment was properly vacated. (*Taylor* agt. *Troncoso*, 76 N. Y., 590.)

SHERIFF.

1. Where an action was commenced by plaintiff against the defendant and he was arrested by the sheriff, who took from him an undertaking signed by two sureties, who failed to justify on being ex-
cepted to:

Held, that upon the failure of the sureties to justify the sheriff became liable as bail. The sureties were not liable thereafter as bail, but they remained liable to the sheriff for all damages which he might sustain by reason of their omission to justify. (*Douglas* agt. *Warren*, ante, 264.)

2. Where the sheriff is liable as bail he has all the rights and privileges, and is subject to all the duties and liabilities of bail. One of the rights and privileges of bail is, that they may surrender the defendant in their own exoneration. Such surrender, however, must be made to the sheriff. (*Id.*)
3. When the sheriff seeks to exonerate himself from liability as bail by surrendering the defendant, he must rearrest him and surrender

him to the custody of the jail. He cannot exonerate himself by surrendering him to the coroner, as the coroner has no right to receive him or to detain him in custody. (*Id.*)

4. It is only when the sheriff is a party to the action, in which the order of arrest was issued, that the coroner is authorized to act. (*Id.*)

5. It is the duty of a sheriff, having power to appoint deputies, to make the best appointment in his power, according to his judgment at the time when he makes it, and a promise by him, though for a valuable consideration, to appoint a certain person to the office of deputy sheriff, is void as against public policy.

Quare, as to whether, in any event, such a contract could be enforced at law, if the officer could, without cause, immediately remove the person from the office to which he claimed the right to be appointed. (*Hager* agt. *Catlin*, 18 Hun, 448.)

6. Where an officer acting under an execution requires a bond of indemnity from the plaintiff therein, it will be presumed, unless the contrary clearly appear, that such bond is intended to relate only to property already levied upon, and not to property which may thereafter be levied upon, especially where the plaintiff in the execution has not directed such subsequent levy or approved thereof. (*Clark* agt. *Woodruff*, 18 Hun, 419.)

7. One Huntington, after the recovery of a judgment against him by the defendant, and shortly before the issuing of an execution thereon to the sheriff, executed and delivered to an assignee an assignment for the benefit of creditors, but at the time the execution was received the assignment had not been recorded, nor had the assignee given a bond or taken pos-

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session of the property. The sheriff, under the direction of the attorney for the judgment creditor, levied on certain of the property assigned by Huntington, but, in accordance with further directions from the attorney, took no further proceedings. Subsequently the property was sold by the assignee and a portion of the proceeds applied to the payment of defendant's judgment.

In an action by the sheriff to recover poundage on the value of the property so levied on, not exceeding, however, the amount collectable under the execution, *held*, that he was entitled thereto. (*Benedict agt. Wright*, 19 *Hun*, 27.)

8. Where the sureties to an undertaking, given by a defendant on his arrest, fail to justify, on being excepted to by the plaintiff, the sheriff becomes liable as bail, and can only exonerate himself by re-arresting the defendant and holding him in actual custody. (*Douglass agt. Warren*, 19 *Hun*, 1.)

9. He cannot surrender him to a coroner, and any undertaking taken by the coroner on releasing him after such surrender is void. (*Id.*)

10. On December 3, 1875, the plaintiff delivered an execution to one Paine, a deputy of the defendant. The defendant was then sheriff of Monroe county, his term of office expiring on the last of that month. The execution not being paid within sixty days, it was held by Paine, with the knowledge and consent of the plaintiff and the sheriff, in the expectation that the debtor would pay it later. Thereafter the debtor paid the amount thereof to Paine, who returned the execution as satisfied, in the name of the defendant, as late sheriff, but did not pay over the money so received to either the plaintiff or the sheriff.

In an action against the sheriff to recover the amount so received

by his deputy, *held*, that the plaintiff was entitled to recover. (*Ross agt. Campbell*, 19 *Hun*, 615.)

11. On December 18, 1878, a decree in foreclosure was, in pursuance of chapter 489 of the laws of 1876, delivered to Albert Daggett, the sheriff of Kings county, with directions to execute it. His term of office expired December 31, 1878. On receiving the decree he advertised the property for sale on January 10, 1879, and on that day sold it in pursuance of such advertisement:

Held, that the advertisement of the property was a "seizure" within subdivision 4, of section 184 of the Code of Civil Procedure, and that under section 186 thereof the sheriff was authorized to sell, though his term of office had expired before the day of sale. (*Union Dime Savings Inst. agt. Andariese*, 19 *Hun*, 310.)

12. Under an execution, in the usual form, in an action for the claim and delivery of personal property, it is the duty of the sheriff to take and deliver the property as commanded, not only if he finds it in the possession of any person named therein, but also if he finds it in the possession of any other person; unless he can justify his refusal to do so by showing that such person has a title or right of possession superior to that of the party to whom he is commanded to deliver it. (*Hoffman agt. Connor*, 76 *N. Y.*, 121.)

13. Where, therefore, to such an execution, the sheriff returned that he could not find the property so as to make delivery, and it appeared, in an action against him for a false return, that he knew where the property was within his county, and could have found it, but refused to take it or to take any action in regard thereto, upon the sole ground that it was in the possession of one M., *held*, that in the absence of proof that M.

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had any title to the property or right to the possession as against plaintiff, the sheriff was liable. (*Id.*)

14. Defendant offered in evidence a chattel mortgage, purporting to cover the property, given by one A. H. to M. There was no allegation in the answer or offer to prove that plaintiff did not own the property, or that M. did own it or have any right to the possession thereof:

Held, that the mortgage was properly excluded. (*Id.*)

15. For the purpose of proving value, plaintiff was allowed to testify, under objection and exception, as to what she gave for the property:

Held, no error. (*Id.*)

16. At the time the objection was made, it did not appear when the property was purchased by plaintiff; subsequently, it appeared that the purchase was made ten years prior to the false return; the objection was in no way renewed:

Held, that there was no exception to present the point upon appeal, that evidence of the purchase price so long before was incompetent. (*Id.*)

SPECIAL TERMS.

1. The charter of the city of New York conferred upon the mayor the power to remove the relator "for cause, after opportunity to be heard:—"

Held, the power is not an arbitrary one, and can be exercised only upon just and reasonable grounds, and after notice; that the proceeding for removal must be instituted upon specific charges, sufficient in their nature to warrant removal; that such charges, unless admitted, must be proven; that on such proceedings the party has a right to cross-examine the witnesses against him, and to call witnesses in his own behalf, and

to be represented by counsel; that these conditions must be complied with before the power of removal is exercised.

Held, further, that such proceedings are *judicial* and subject to review by *certiorari*, issuing from the supreme court. The powers of the supreme court to be exercised by the judges in general term, circuit, oyer and terminer or special term, are conferred by the Constitution, and cannot be limited either by the legislature or by any power conferred by it upon the court itself. One special term, or one judge at special term, can have no more authority or power than another. (*The People ex rel. The Mayor agt. Nichols, ante, 200.*)

2. Under section 233 of the Code of Civil Procedure, the justices of a judicial department may appoint the times and places for holding special terms. If, under this power, some terms are designated as "*special terms for equity cases and enumerated motions*," and others as "*special terms for non-enumerated motions and chambers business*," such designation, in so far as it limits the class of proceedings to be had at any special term, is subject to the control of the justice assigned to hold it. By designating a special term as one for *non-enumerated motions and chambers business*, the power of the judge presiding thereat cannot be limited. Such term would still be a special term, and the justice holding it would have all the powers of any judge holding any special term. (*Id.*)
3. The power of the general term to grant a writ of prohibition addressed to the special term, is to be exercised in the same manner and to the same effect as when it is issued to inferior courts and magistrates, and the inquiry relates only to the jurisdiction. Error or mistake in practice affords no foundation for the writ,

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unless it involves doing something contrary to the general law. (*Id.*)

4. There is no absolute right to a notice of eight days on enumerated motions. A shorter notice may be prescribed by a judge or court, under section 780 of the Code, and Rule 87 of the supreme court. The exercise of this power is subject to review. (*Id.*)

5. Bringing on for hearing a *certiorari* upon the return thereto, is like a motion for judgment on the pleadings, on the ground that the answer raises no issue of fact, and it would present a question of law only. Such motion is of the class called *non-enumerated*, as defined by supreme court Rule 38. (*Id.*)

6. Rule 44 of the supreme court, which provides that a case on *certiorari* may be brought to a hearing "upon the usual notice of argument at special term," is controlled by section 780 of the Code, which authorizes the judges to prescribe a notice of less than eight days. (*Id.*)

STATUTE OF LIMITATIONS.

1. An action for false imprisonment will lie for, and immediately upon, an illegal arrest. (*Dusenbury* agt. *Kielly*, ante, 286.)

2. Consequently, the statute of limitations begins to run from the time of such illegal arrest, and the cause of action therefor is barred at the end of two years from such arrest, although the proceedings in which the arrest took place are continued within the two years. (*Id.*)

3. The legacy given to the plaintiff by the testator cannot be deemed a satisfaction of the plaintiff's claim for services, as there is nothing in the case to justify an inference that such was the in-

tention of the testator. (*Persoll* agt. *Fry*, ante, 817.)

4. Where one enters into the service of another, such service continuing for many years, the master paying various sums of money from time to time on account of such services:

Held, that the payments made were acknowledgments of the indebtedness and sufficient to take the whole claim out of the statute of limitations.

Held, further, that the claim of the plaintiff, at any and all times, for previous services, was an entire account, and she could have maintained but a single cause of action thereon; and that a payment by the intestate upon the balance due the claimant took the entire balance out of the operation of the statute. (*Id.*)

See WILL.

Giraud agt. *Giraud*, ante, 175.

STAY.

See HABEAS CORPUS.

The People ex rel. *Conley* agt. *Bowce*, ante, 393.

See CRIMINAL LAW.

The People agt. *Moett*, ante, 467.

STENOGRAPHER'S FEES.

1. Court stenographers are only entitled to charge to counsel for furnishing an official copy of the stenographic minutes of a trial *ten cents per folio of 100 words by actual count*; and on application of the attorney he will be ordered to write out his minutes and make out his bill at such rate. He cannot require an attorney to pay in advance for such copy. (*Wright* agt. *Nostrand et al.*, ante, 184.)

2. Attorneys as well as stenographers are officers of the court and

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subject to its orders; and in any case where it should be made to appear that an attorney had wrongfully refused to pay the legal charges of the stenographer, the court will protect the latter by a summary order against the attorney. (*Id.*)

8. The fee allowed by law to official stenographers of the court for furnishing a copy of the stenographer's minutes of a trial to counsel is *ten cents per folio* (*Following Wright* *agt. Nostrand*, *post*, 184). (*Guth* *agt. Dalton*, *ante*, 289).
4. *It seems* that, under section 86, the stenographer may require payment of his fees in advance (*This is adverse to Wright* *agt. Nostrand*, *post*, 184). (*Id.*)

STOCK.

1. Where, in an action to recover on subscription to stock, it appeared that the only payment made by the defendant at the time of the subscription was by giving his check for the ten per cent required by statute, payment of which was stopped, and it still remains uncollected in the possession of the company:
Held, that this did not legally amount to a payment of "ten per cent of the par value of the stock subscribed in cash," as required by the statute, and that it gave no interest in the stock and the company could not sustain an action for the cause. (*Excelsior Grain Binder Company* *agt. Stayner*, *ante*, 278.)
2. An actual payment is needful to make a complete contract, though not necessarily to be made at the time of the subscription. (*Id.*)

SUBSTITUTION.

1. Where a plaintiff had, pending the action, transferred his interest

and died, and after his death his assignee, on notice to the defendant alone, moves to be substituted as plaintiff, the motion should be denied for want of notice to the personal representatives of the deceased plaintiff. (*McLaughlin* *agt. The Mayor*, *ante*, 105.)

SUBMISSION OF CONTROVERSY.

1. Under the provision of the Code of Civil Procedure (*new Code*, *sec.* 1279), providing for the submission of a controversy upon facts admitted, the facts agreed upon must be such as will enable the court to render the proper judgment, and the submission must be by the parties to be affected thereby. (*Dickinson* *agt. Dickey*, 76 *N. Y.*, 602.)
2. A case, purporting to be submitted under said section, was entitled the same as an action for foreclosure, which was set forth therein. It was stated, in substance, that under judgment of foreclosure and sale in said action, a referee was appointed to sell, that plaintiffs became the purchasers, and, "as such purchasers and owners," they afterwards agreed to sell to a purchaser, whose name was not given; that such purchaser objects to the title, upon the ground that the referee was not properly appointed, and the submission closed with the statement that motion was made to compel said purchaser to take title:
Held, that the case submitted was fatally defective; and that no decision could properly be given thereon. (*Id.*)

SUMMARY PROCEEDINGS.

1. The court will take judicial notice of the statutes creating the wards embraced within the juris-

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diction of the several judicial district courts, and the fact that the premises are within the district of the justice who issues process in summary proceedings need not, therefore, be stated in the landlord's affidavit. (*Armstrong et al* agt. *Cummings and Ingersoll, ante*, 381.)

3. The fact that furniture is embraced in a demise of land does not deprive the landlord of the summary remedy furnished by the statute against tenants who fail to pay rent, or who hold over after the expiration of the term for which the premises were hired. (*Id.*)

3. The rent issues out of the land and not out of the furniture, which is a mere incident of the demise. (*Id.*)

4. Where F. commenced summary proceedings, under the statute, to dispossess H. from certain premises to which F. claimed title under an execution sale upon a judgment against the owner of the tenement and of the ground lease; upon the return of the summons the tenant's counsel objected that the proceedings in such a case could only be maintained against the execution debtor. Judge McADAM overruled this objection and adjourned the proceeding for trial. Higgins, the receiver of the judgment debtor's estate, against whom the various proceedings were allowed to be continued by order of the court that appointed him, applied for a writ of prohibition:

Held, that the admitted facts took the litigation without the operation of the statute and, consequently, without the jurisdiction of the court and a writ of prohibition was the proper remedy. (*The People ex rel. Higgins* agt. *McAdam, ante*, 443.)

5. Where, in pursuance of a written agreement, two leases of the

same premises were executed at the same time, upon the same consideration and terms, and as parts of the same transaction, one for eight and the other for twelve years, beginning at the expiration of the first term, *held* (CHURCH, Ch. J., *dissenting*), that the two leases were to be construed together, as if contained in the same instrument, and were void; and that summary proceedings by the lessor to remove the lessee were maintainable. (*Clark* agt. *Barnes*, 76 N. Y., 801.)

6. The essential requisite to authorize summary proceedings under the statute (§ R. S., 513, *secs.* 23 et seq.) to remove a tenant holding over after expiration of his term, is that the conventional relation of landlord and tenant exists; the person in possession may, under a denial by affidavit of the facts upon which the summons is issued, prove that the alleged lease was executed under and in pursuance of a usurious agreement, and is void; and so, that such relation does not exist. (*People ex rel. Ainlee* agt. *Howlett*, 76 N. Y., 574.)

7. The rule that the tenant cannot dispute the title of his landlord does not apply to such case. (*Id.*)

8. In summary proceedings to remove relator from certain premises, as a tenant holding over after the expiration of his term, he put in an affidavit stating, in substance, that the alleged lease was executed under and in pursuance of a usurious agreement between the parties, made in May, 1876, by which defendants agreed to loan to relator the sum of \$5,600, he agreeing to pay for the use of the same, \$500, over and above lawful interest; that to secure the payment of the loan relator agreed to give a deed of the premises of which he then was in possession as owner, defendants to execute a contract agreeing to sell

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and reconvey the property; and in order to cover up and conceal the usury, under the name of rent, to execute a lease of the premises to April 1, 1877, for a nominal rent of \$500; that the loan was made, and the deed, contract, and the lease in question executed as so agreed:

Held, that the affidavit was equivalent to a denial of the facts upon which the summons was issued; and that a refusal of a trial by jury, as prescribed by the statute (2 R. S., 514, sec. 34), was error. (*Id.*)

SUMMONS.

1. In an action to foreclose a mortgage where the summons was accompanied by a notice of no personal claim, which was served upon the defendant H., whose name appeared in the notice, but not in the summons; the summons also failed to specify the office, post-office address or street number of the plaintiff's attorney, and no reference thereto was made in the notice:

Held, that the words of section 417 of the Code of Civil Procedure were not mandatory, and that the omission was not a jurisdictional defect, but could be cured by amendment (*This is adverse to Osborn* agt. *McCluskey*, 55 How., 345). (*Wiggins et al.* agt. *Richmond et al.*, ante, 376.)

2. Where a warrant of attachment having been granted against the property of the defendants as non-residents, an order was obtained for the service of the summons by publication which was entitled, "At special term of the supreme court of the state of New York, held at chambers. Present, hon. ABRAHAM R. LAWRENCE, justice;" it recited: "The plaintiffs having presented to me the verified complaint in this action, * * * and having also made proof to my satisfaction that said de-

fendants are not residents of this state;" it was signed "Enter. A. R. L., J. S. C." It did not appear that the order had ever in fact been entered as a court order, but it was shown that the order was in fact made and signed out of court, in the judge's private room:

Held, that it was good as a chambers order of the judge, and a service of the summons by publication in pursuance thereof was effectual (*Affirming S. C.*, 19 Hun, 116). (*Phinney and others* agt. *Broschell and others*, ante, 492.)

3. The caption of the order and the direction to enter are not conclusive as to its character, but the court will look at the facts as proved by the papers to exist to determine its character. (*Id.*)

4. Where an order had been made for the service of the summons by publication, which order was similar in all respects to that in *Phinney* agt. *Broschell* (ante, 492), but it did not appear, as in that case, that the order had been made in the judge's private chambers:

Held, that it was not void by reason of its having a caption and a direction to enter, but could be treated as the order of a judge:

Held, also, that the order might be amended, on motion, after it had been acted upon, by striking out the superfluous portions. (*Mojarietta et al.* agt. *Saens et al.*, ante, 494.)

See ATTACHMENT.

Mojarietta and another agt. *Saens and others*, ante, 505.

SUPPLEMENTARY PROCEEDINGS.

1. An order in supplementary proceedings should not direct the proceedings to be sent to any other county than that in which the ex-

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amination is had. (*Purdee* agt. *Tilton*, *ante*, 476.)

2. The representatives of a party whose rights, under the judgment and execution, had been determined prior to September, 1877, may institute supplemental proceedings without renewing the action. (*Id.*)
3. In proceedings supplementary to execution, the judge cannot direct property of the judgment debtor (a horse), to be delivered to the creditor on his giving the debtor a receipt for his claim. The property should be sold under an execution or by a receiver. (*Dickinson* agt. *Onderdonk*, 18 *Hun*, 479.)
4. *Semble*, that where, in supplementary proceedings, the debtor claims that property, which may by law be exempt from execution, is in fact so exempt, the question of exemption cannot be tried in such proceedings, but must be tried in an ordinary action. (*Id.*)

SURPLUS MONEYS.

1. In proceedings to distribute surplus moneys a question of fraud may be investigated before the referee, and every question may be examined tending to show the equities of the claimants. (*Tutor* agt. *Adams*, *ante*, 355.)
2. Proceedings under chapter 804, Laws 1868, for the recovery of surplus moneys arising upon mortgage foreclosures by advertisement are special statutory proceedings. (*Matter of Gibbs*, *ante*, 502.)
3. Successful claimants may, in the discretion of the court, be allowed costs under chapter 270, Laws 1864, at the rate allowed for similar services in civil actions. (*Id.*)
4. Proceedings for the recovery of surplus moneys arising upon fore-

losures by action are proceedings in the action, and are similar to proceedings under chapter 804, Laws 1868. When costs are allowed, they must be at the rate allowed in proceedings for the recovery of surplus moneys arising upon foreclosures by action, *i. e.*, necessary disbursements and motion costs. (*Id.*)

SURROGATE.

1. The jurisdiction to vacate, modify and rescind orders in cases where the court has been imposed upon, is exercised by the supreme court without question as to its right and authority so to do. (*Matter of the estate of Cohen*, *ante*, 496.)
2. The same power is conferred upon the surrogate of the city of New York by section 1 of chapter 359, Law of 1870, which provides that "the surrogate of this county has jurisdiction to set aside, open, vacate or modify the orders and decrees of this court with the same power as is exercised by courts of record of general jurisdiction." (*Id.*)
3. Accordingly, where, on application to the surrogate for an order vacating and setting aside two orders, one of which accepts the resignation of D. B. as general guardian of minors and discharging him from his trust as such guardian, and the other of said orders releasing said guardian and his sureties from all future liability upon his official bond and for other and future relief: *Held*, that it appearing to the satisfaction of the surrogate that the orders were procured from his predecessor by false statements made under oath, by a false receipt, by the suppression of facts and by deception practiced upon the court that they should be revoked because of the fraud. *Held*, further, that the account-

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ing of the general guardian and the orders made thereon present no bar to a proceeding to vacate them for fraud under the act of 1870. (*Id.*)

SURVIVORSHIP.

1. Where an action was brought by plaintiff against the defendant, who was a practicing physician and surgeon, to recover damages alleged to have been caused by his improper and unskillful treatment of the plaintiff, who had sustained a fracture of the bones of her wrist and employed the defendant in his professional capacity to treat the same, and pending the suit the defendant died:

Held, that the action does not survive against the defendant's executors, the injuries alleged to have been sustained by the plaintiff being injuries to her person and not to her estate. (*Best* agt. *Vedder*, ante, 187.)

2. Pain and bodily injuries do not possess such transmissible qualities as to compel the living to atone for such as the dead inflicted, nor to entitle them to receive satisfaction for such as the dead suffered. (*Id.*)

TAXES AND ASSESSMENTS.

1. Where the statutes provided that "all real and personal estate liable to taxation be estimated and assessed by the assessor at its *full* and *true* value, as they would appraise the same in payment of a just debt due from a solvent debtor," and when the assessors had completed their roll they were required to make an oath which contained this clause: "We have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the *full* and *true* value thereof and at which they would

appraise the same in payment of a just debt due from a solvent debtor," instead of which the oath of the assessors, appended to the assessment roll, read: "We have estimated the value of the said real estate at the sums which a majority of the assessors have decided to be the *fair proportionate value* thereof and at which, in the *same ratio*, they would appraise the same in payment of a just debt due from a solvent debtor:"

Held, that such a departure from the statute vitiates the entire assessment, and where a county treasurer had, under the provisions of the statute, advertised for sale the lands of the plaintiff for an unpaid tax, he is entitled to the preventive remedy of an injunction to restrain the sale of the same. (*Beach* agt. *Hayes*, ante, 17.)

2. Where a deed, given by a public officer, is *prima facie* evidence of title, a party should have a preventive remedy, because there is then, if such deed is given an apparent cloud resting upon the title of the owner, which extrinsic evidence only can remove. (*Id.*)
3. Where, as in this case, the treasurer's deed is, by law, made "presumptive evidence" that all the statutory provisions have been complied with, and if the plaintiff's property is sold and conveyance executed, the title in the purchaser will be, apparently and presumptively, complete, and can only be attacked and overthrown by affirmative evidence given by the plaintiff, the court is authorized to intervene by injunction and restrain the sale. (*Id.*)

TITLE TO OFFICE.

1. Prior to 1878 the charter of the city of New York provided that each board of the common council should "be the judge of the election returns and qualifications

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of its own members " (*Lanes of 1857, vol. 1, page 875*):

Held, that the decision of the board of aldermen in such cases could not be reversed or set aside by the court.

Held, further, that the change in the phraseology of the charter of 1878 does not give to the court the power, in an action in the nature of a *quo warranto*, to pass upon the question of title to the office of alderman where the board has declared in favor of such right. (*The People ex rel. Hatsel agt. Hall, ante, 147.*)

2. The charter makes the judgment of the board the subject of review by any court of competent jurisdiction, or, in other words, it permits an appeal to a court of competent jurisdiction from the judgment of the board. But the judgment of the board cannot be reviewed in an action to which the board is not a party, and in which the record of that board is not before the court. (*Id.*)
3. It is the office of the writ of *certiorari* to correct errors of a judicial character committed by an inferior tribunal or body, and that writ brings the record before the court for examination and review, and such writ should be returnable before the general term. In cases of this kind a circuit judge, in a circuit court, cannot sit as an appellate tribunal to review the judgment and decision of an inferior tribunal. (*Id.*)

TORT.

See EXECUTION.

Dougherty agt. Gardner, ante, 384.

See COMPLAINT.

De Witt agt. McDonald, ante, 411.

See MARRIED WOMAN.

Lansing agt. Holdridge, ante, 440.

TRIAL.

1. It is a familiar rule for the conduct of a trial that a party holding the affirmative is bound to introduce all the evidence upon his side before he closes. He must exhaust all his testimony in support of the issue on his side before the testimony on the opposite side has been heard. (*Marshall and Miller agt. Davies and others, ante, 281.*)

2. He can afterwards introduce evidence in rebuttal only. Rebutting evidence in such cases, means not merely evidence which contradicts the witnesses on the opposite side, and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. (*Id.*)

3. Where the defendant had been examined in support of his allegation of notice and request to foreclose a mortgage, and he had testified to a conversation with M., upon which he relied, and that he thought there was none subsequent:

Held, that having rested his case, and the plaintiff having closed his testimony, the defendant had no legal right to reopen his own case and introduce evidence to sustain his defense, which he might have introduced when the case was with him.

Held, further, that after having testified to one conversation which was denied on the other side, the defendant was not entitled, as a matter of right, to prove another as to which he had not previously testified, even though it tended to support his original statement. (*Id.*)

4. This was not evidence in rebuttal. The testimony on the part of the plaintiff was that other conversations might have been held, but that no conversation of the nature testified to by the defendant ever took place. This was a mere de-

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nial, and not proof of any affirmative fact which the defendant had the right to rebut. (*Id.*)

5. These rules may, in special cases, be departed from, in the discretion of the trial judge, but a refusal to depart from them is no ground of exception. (*Id.*)

6. Under the provision of the charter of the village of Port Jervis (*sec. 40, chap. 870, Laws of 1873*), giving to the police justice of said village the jurisdiction, powers and authority of the justices of the peace of the town in which the village is situated, with "jurisdiction to hear and determine all cases arising under the charter, by-laws or ordinances," the jurisdiction in the class of cases last specified, is to be exercised in the same manner as in cases before justices of the peace. (*People ex rel. Daryin agt. Cox, 76 N. Y., 47.*)

7. In an action, therefore, for a violation of an ordinance of said village, *held*, that defendant was entitled to demand and have a jury, as on trial before a justice of the peace. (*Id.*)

8. An erroneous ruling, as to the burden of proof, is not cured by the fact that the party, upon whom the burden is improperly imposed, ineffectually attempts to make a case under the ruling; he may rest upon his exception, but it is not waived or its force impaired by his attempting to comply with the erroneous ruling. (*Nickerson agt. Ruger, 76 N. Y., 279.*)

9. Where the complaint in an action does not state facts sufficient to constitute a cause of action, the objection is available on trial upon motion to dismiss the complaint. (*Tricker agt. Arnova, 76 N. Y., 897.*)

10. Where a motion to dismiss is

made upon that ground, the granting it is not a matter of discretion, but of legal right. (*Id.*)

11. Where the objection was raised and was not waived, and no amendment of the complaint was made or asked for on the trial, the correctness of the ruling denying motion to dismiss must be tested on appeal on the complaint, as it stood, not as it might have been changed by amendment; and if the ruling was erroneous, it is fatal to a recovery. (*Id.*)

TRUST DEED.

1. Where a deed of trust directs, in plain terms, in what particular securities funds coming into the hands of the trustees shall be invested, and how, until so invested, they shall be held, the court cannot, by its judgment, defeat the intentions of the creator of the trust, and the beneficiaries thereunder, by directing different investments. (*Clark agt. St. Louis, Alton and Terre Haute R. R. Co., ante, 21.*)

2. Without the consent of those beneficially interested in the trust, investments directed to be made in first mortgage securities, cannot be made through the judgment of the court, in those of an inferior lien. (*Id.*)

3. For the purpose of securing such change in investment, the trustees do not represent the beneficiaries, and an action to this end cannot be prosecuted in their names, the beneficiaries not being parties defendant, and having no opportunity to be heard in relation to the propriety of granting such relief. (*Id.*)

UNDERTAKING.

1. The undertaking required by the Code of Civil Procedure is amend-

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able. And where the undertaking, on which the order of arrest was granted, is in the form required by the old Code of Procedure, the defect is cured by the execution and service of a new undertaking which conforms to the requirement of the Code of Civil Procedure, and a motion to vacate the order of arrest will be denied on proof of the execution and service of new undertaking by the same sureties before the motion is heard:

Held, also, that a complaint on information and belief, verified by the agent of plaintiff, is sufficient on a motion to vacate, where the agent sets forth in the verification, and also in a separate affidavit, the sources of his information and the grounds of his belief. (*Pember* agt. *Schaller*, ante, 511.)

2. In July, 1864, plaintiff recovered a judgment against one Whitbeck for the possession of certain real property. Whitbeck appealed to the general term, and to stay proceedings, gave an undertaking, signed by the defendant Simmons, by which the latter agreed, among other things, "that during the possession of such property by the appellant, he will not commit, nor suffer to be committed, any waste thereon." The judgment was affirmed September 28, 1865, and Whitbeck, six days thereafter, appealed to the court of appeals, giving an undertaking, with other sureties, to stay proceedings. In January, 1867, the judgment was affirmed by the court of appeals. In the winter of 1866 and 1867, Whitbeck committed waste upon the property.

In an action to recover the damages occasioned thereby, *held*, that Simmons was not liable therefor, that his liability became fixed upon the giving of the undertaking upon the appeal to the court of appeals, and could not be affected by any subsequent acts of Whitbeck. (*Church* agt. *Simmons*, 19 *Hun*, 230.)

3. Given on a plea of title, must comply with provisions of section 12, chapter 96 of 1854. (*See Kohlbrener* agt. *Elaheimer*, 19 *Hun*, 88.)

4. Taken by a coroner, on releasing a defendant surrendered to him by the sheriff, when void. (*See Douglass* agt. *Warren*, 19 *Hun*, 1.)

5. Where, in an action by a judgment creditor upon an undertaking given to stay proceedings pending an appeal to this court, it appeared that at the time of the commencement of the action the judgment had been regularly attached at the suit of creditors of the judgment-creditor, and the attachments were still in force, *held*, that the action could not be maintained; that the undertaking was simply a collateral security for the judgment and passed with it to the sheriff; that it was not necessary to attach the undertaking separately, as it was an incident of the judgment, not an independent liability of the sureties. (*Whele* agt. *Spellman*, 75 *N. Y.*, 585.)

6. Where the sureties to an undertaking upon appeal to this court from a final judgment fail to justify, the appellant may give a new undertaking at any time within the year allowed for appeal, and when given the appeal becomes effectual; and if the respondent fails to except to the sureties within the time allowed, the new undertaking becomes perfect for the purposes of the appeal (*New Code*, secs. 1825, 1826, 1827). (*Blake* agt. *L. and F. Mfg. Co.*, 75 *N. Y.*, 611.)

7. Under the Code of Civil Procedure (*new Code*, sec. 1800), a notice of appeal to this court may be served before any undertaking has been executed, and the undertaking may be given at any time before the expiration of the time for appealing (sec. 1834); but the notice does not become effectual for

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any purpose until the undertaking has been given (*Sec. 1826*). (*Raymond agt. Richmond, 76 N. Y., 106.*)

8. An action cannot be maintained upon an undertaking, given under section 848 of the old Code, upon appeal to the general term, without proof of service upon respondent, ten days before the commencement of the action, of a written notice of the entry of the order or judgment affirming the judgment appealed from. (*Ras agt. Beach, 76 N. Y., 164.*)

9. In an action upon such an undertaking the only paper claimed to have been served was what purported to be a copy of an order made at general term, April 28, 1875, marked as received by respondent's attorney, April twenty-ninth. There was no notice indorsed, and no intimation in or upon the paper that the same had been entered. The judgment roll, which was produced on trial, contained the original order; there was nothing thereon to indicate that it had been filed or entered, prior to the entry of the judgment, which was on May 15, 1875:

Held, that the presumption, in the absence of proof, was that the order was neither filed nor entered until the judgment roll was filed and docketed, and that, therefore, the facts failed to show service of the required notice; and that the omission was not a mere irregularity, but a vital defect, fatal to a recovery; also, that defendants did not waive service of notice by not pleading the failure to serve; also, that they did not waive this defense by basing their refusal to pay, when called upon, on other grounds. (*Id.*)

10. Also, *held*, that an admission, upon the part of the appellant in the original action, without the knowledge or assent of the sureties, to the effect that he had received the notice required, could not affect the rights of the sureties. (*Id.*)

11. As to whether the said section did not require a notice of the entry of judgment, where judgment was in fact obtained; and as to whether the reference to orders was intended to apply where a judgment not an order was appealed from, *quære*. (*Id.*)

12. An order of reference to ascertain the damages sustained by defendant, by reason of an injunction, recoverable upon an undertaking given under the Code of Procedure (*old Code, sec. 223*), cannot be granted until it has been determined by judgment or other decision of the court that plaintiff was not entitled to the injunction; it is not sufficient that this appears by the facts developed upon the trial. (*Benedict agt. Benedict, 76 N. Y., 600.*)

USURY.

1. A contract is to be governed by the laws of the place where it is made, if it is not, by its terms, to be performed elsewhere; but if, by its terms, it is to be performed in a state other than that in which it is made, the law of the state in which it is to be performed must govern (*Affirming S. C., 18 Hun, 405; see S. C., 58 How., 40.*) (*Dickinson agt. Edwards, ante, 24.*)

2. This is the general rule of construction. The exceptions to it stated. (*Id.*)

3. The case of *Jewell agt. Wright* (30 *N. Y., 269*) approved, and the cases of *Brown agt. Bradley* (9 *Abb. Pr. [N. S.], 895*), and *Wayne County Savings Bank agt. Low* (6 *Abb. N. C., 76*), disapproved. (*Id.*)

VENDOR AND PURCHASER.

1. Where property is conveyed subject to a mortgage upon which back interest has accrued, but has

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not become payable according to the terms of the instrument, and the vendee is obliged to pay such interest to the holder of the mortgage when it becomes due:

Held, that the vendee has no cause of action against the vendor for the proportionate amount which had accrued prior to the delivery of the deed, in the absence of an express covenant upon the part of the vendor to pay the same. (*Lynch agt. Rinaldo, ante, 188.*)

2. Rent, when apportioned as between assignor and assignee, see note at foot of case. (*Id.*)

VERDICT.

1. In an action for personal injuries, a verdict of a jury will not be set aside as excessive unless it manifestly appears to be the result of passion, partiality, prejudice or corruption. (*Minick agt. City of Troy, 19 Hun, 258.*)

VOLUNTARY TRUSTS.

1. Where a father deposited his earnings in a savings bank, in his own name, as trustee for his children severally, in sums to draw the largest interest, but, under circumstances which make it clear that he did not intend thereby to part with his ownership of, or interest in, the moneys, or the right to control the same:

Held, that no such trust was created by such deposit, in favor of the children, as would enable them to take the same from the control of their father. (*Weber agt. Weber and others, ante, 255.*)

2. Also, that whether a trust was created was a question of fact, in determining which the court would give effect to the purposes and objects which the settler had in view in making the deposits. (*Id.*)

WILL.

1. Testator gave a daughter a legacy of \$5,000 and a brother a legacy of \$3,000. He further directed his executor to invest a sum sufficient to pay his widow during her life, \$300 per annum, and another sum sufficient to pay a son \$100 per annum, during life. He then gave the *residus* of his estate to the daughter to whom he had given the \$5,000 except the *principal* of the two sums invested to pay the annuities to his son and widow, "which I direct to go to my heirs-at-law." The executor invested sums sufficient to produce the annuities when there was not sufficient to pay the \$5,000 legacy to the daughter, and that of \$3,000 to the brother, in full:

Held, 1. That on the death of the widow and the son, the principal of the sums invested to produce these annuities should be applied to the payment of the balances unpaid on the \$5,000 and the \$3,000 legacies.

2. That such legatees were entitled to interest upon the unpaid balances of their legacies, commencing one year after the granting of letters testamentary. (*Wilde agt. Wilde et al., ante, 71.*)

2. Where a testator sells and conveys all of his real estate previously devised by him, his estate and interest therein is *wholly divested*, and not merely altered. (*Matter of Dowd, ante, 107.*)
3. At common law the least alteration of the interest of the testator in property devised or bequeathed by him, would work a revocation of the devise or bequest of such property. (*Id.*)
4. An alteration of the nature or character of the interest of the testator in the property devised or bequeathed does not, under the provisions of sections 42 and 48 of 2 Revised Statutes, 64, in all

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cases work a revocation in respect to such property. (*Id.*)

5. But where the testator, in his lifetime, wholly divests himself of the property previously devised or bequeathed, the revocation is, as to such property, as complete and perfect as it was at common law. (*Id.*)

6. A testator, by his will, bequeathed to his wife all his personal estate and the use for life of all his real estate, and authorized his executors, together with his wife, to sell and convey his real estate, and to deposit the avails in a savings bank, his wife to receive, from time to time, while any of the fund so deposited remained, sufficient for her support during her life, and if any of the avails of such sale remained after paying such expenses, together with her funeral expenses, and the reasonable expenses of the executors, the balance to be paid to St. Mary's Roman Catholic Church and the Roman Catholic orphan asylum. The testator, in his lifetime, and after the execution of the will, sold all his real estate and deposited the avails in the Rochester Savings Bank, such avails constituting his entire estate. His wife died after this sale, but before the death of the testator:

Held, that the corporations named in this will could not take as legatees, the subject-matter of the devise and bequest to them being totally destroyed or changed by the voluntary act of the testator in his lifetime. (*Id.*)

7. The whole scheme of the testator's testamentary disposition was essentially varied by him, and the law presumes a revocation in consequence of the change in his family and property. The fact that he deposited the avails of the sale of his real estate in the savings bank is not sufficient to rebut this presumption of law:

Held, further, that the Roman Catholic orphan asylum could not claim as residuary legatees. (*Id.*)

8. When it is manifest, from the expressed words of the will, that the gift of the *residuum* is confined to the residuum of a particular fund, or description of property, or to some certain residuum, the legatee will be restricted to what is thus particularly given. (*Id.*)

9. As in this case if the wife had survived there would have been no residuum as she would have taken the whole as personal estate; she having died before the testator, and the entire estate, by his subsequent act, having become personal property, and being such, at the time of his death, it is to be treated as a lapsed legacy, and in the absence of a legatee capable of taking under the will *pro tanto* revoked, it must be distributed to the next of kin, under the statute of distribution. (*Id.*)

10. Is the provision of the act of 1848 as to devises and bequests for charitable uses repealed by the act of 1860, "relating to wills," (*Chap. 860, Laws of 1860*), *quære*. (*Id.*)

11. Where a testator gave to his executors all his estate, real and personal, to hold the real estate during the joint lives of his *two* sisters, A. and E., and the life of the survivor, in trust, to receive the rents and profits of the *estate*, to sell the *personal* estate whenever they might deem it wise, and reinvest the proceeds as they might consider safe, and to pay four-fifths of the income of the *estate*, as the same should be received, unto the mothers and *three* sisters of the deceased, and the remaining four-fifths unto the testator's wife, and upon the further trust during the joint lives of the *two* sisters named, and the life of the survivor, to sell and dispose

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- of the *real estate* and to receive and invest the proceeds, and that in case H., a sister of the testator, should marry and have children to pay one-fifth part of the *estate*, upon her death, to her children, and upon the further trust, upon the death of the mother and *three* sisters of the testator, to pay and transfer the other four-fifths, and the residue and remainder thereof unto the wife of the testator, and in case of her death to such person or persons as she might, by last will and testament, appoint:
- Held*, that the trust over four-fifths of the testator's estate and its proceeds being continued until the death of the mother and *three* sisters of the deceased was invalid, and the testator must be regarded as having died intestate with respect thereto, but that the gift of one-fifth of the estate to the children of the testator's daughter, H., was valid. (*Giraud* agt. *Giraud*, ante, 175.)
12. An action, commenced more than fourteen years after the will was admitted to probate, for its construction, and for an adjudication of its invalidity, is not barred by the statute of limitations, the *corpus* of the estate still remaining in the hands of the executors and trustees undistributed. (*Id.*)
13. The plaintiff, a beneficiary under the will, was held not to be estopped from maintaining such action for the reason that she had acquiesced in the provisions of the will by receiving her proportion of the income according to its terms. (*Id.*)
14. The omission by a party to assert a right from ignorance of it, does not conclude him. Silence and mere passivity cannot create an estoppel where the other party had equal knowledge of the facts and conditions in which their respective rights originate. (*Id.*)
15. But, in the case above alluded to, the executors of the estate and the other beneficiaries under the will who had, with the plaintiff, received their proportion of the income, were held not to be liable to account for the same. (*Id.*)
16. Where money has been paid with full knowledge of all the facts and circumstances under which it is demanded, it cannot be recovered back upon the ground that the party paying it rested under a mistake as to his legal rights and obligations. (*Id.*)
17. Where there has been an equitable conversion of real estate into personalty for the purposes of a will, and the purpose is invalid as a whole or in part, the conversion fails "*pro tanto*." (*Id.*)
18. Where a testator, after giving legacies to certain persons named in his will, to the amount of \$53,000, directed the rest and remainder of his estate to be invested by his executors so as to yield income, which income he gave to his wife for life, and by a final codicil, after specifically making some new provisions in favor of his wife, directed that the sum of \$60,000 should be set apart from his estate and should be invested by his executors for the benefit of his wife, the testator, however, declaring, in and by the final codicil, that the provisions therein made for his wife were in addition to the provisions he had made in his will and previous "*codicils*" for her; and that his will and codicil, except as changed by the last codicil, were confirmed:
- Held*, that the legacies, to the amount of \$53,000, given to others were not disturbed by the new provisions created in favor of his wife by the last codicil; and that the principal sum of \$60,000 therein directed to be invested by his executors for the benefit of his wife must be raised from the

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rest and remainder of the estate, after the satisfaction of the legacies, although the income of this rest and remainder had been given to her by the will. (*Brown* agt. *Cleveland*, *ante*, 298.)

19. Where there is a real repugnancy between the will and a codicil thereto, then the disposition made by the latter must prevail as the latest expression of the testator. But there is no hostility between the codicil and will under consideration which prevents the construction above indicated, by which effect is given to the provisions of both will and codicil. (*Id.*)

20. Where a testator, by a final codicil to his will, speaks of "a codicil or codicils" to his will theretofore executed, and the expression "codicils" is repeated in other parts of the same instrument, but no codicil is produced, other than the one last executed, and another one executed some years before, and no evidence being adduced of the fact of any other codicil having been executed:

Held, that it must be accepted as a fact that there were no other codicils except the two produced. (*Id.*)

21. Where a clause in the testator's will read as follows: "Ninth. I give and bequeath to the American Bible Society, the American Board of Commissions of Foreign Missions and the Home Missionary Society, the sum of \$1,000 each:"

Held, 1st, that the Home Missionary Society, being an unincorporated society at the time of the making of the will, and at the death of the testator, was not capable of taking the bequest in question:

Held, 2d, that the statutes of 1849, and any amendments thereof, relating to joint-stock associations and suits against them, does not aid the defendant (*Following*

McKeon agt. *Kearney*, 57 *How.*, 350). (*Leonard et al.* agt. *Davenport*, *ante*, 384.)

22. A misnomer or misdescription of a legatee or devisee, whether a natural person or a corporation, will not invalidate the provision if, either from the will itself or evidence *abundant*, the object of the testator's bounty can be ascertained. (*Id.*)

23. To identify a particular corporation as the one intended, where a name other than the corporate name is used, parol evidence is allowable to aid in determining the intention of the testator in the use of the words in the bequest. (*Id.*)

24. In an action for the construction of a will the costs are in the discretion of the court. (*Id.*)

WITNESS.

1. A county assessor who appears before a committee appointed by the board of supervisors of a county, in obedience to a subpoena issued by the chairman of such committee, in accordance with the provisions of section 8 of chapter 190 of the Laws of 1858, cannot be compelled to answer interrogatories concerning moneys in his hands as county treasurer, when he claims that such answers might subject him to a criminal prosecution, or to a penalty or forfeiture. (*Matter of Proceedings against Dickinson*, *ante*, 260.)

2. The witness is exempt from answering because, by the Revised Statutes (*vol. 3 of 6th edition*, page 671, section 171) and the common law, no witness can be required "to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture." (*Id.*)

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3. The act of 1858, under which these proceedings are had, does not prevent the evidence to be given by the witness from being used by the governor for his removal, and, therefore, the rule that a witness "is not bound to speak when the answer may subject him to a forfeiture, or any thing in the nature of a forfeiture, of his estate or interest," applies and exonerates the witness from answering the questions propounded. (*Id.*)
4. *Quare*, as to the constitutionality of the statutes conferring the power on boards of supervisors or its committees to compel the giving of testimony (*See Matter of Pilsbury*, 56 How., 290). (*Id.*)
5. Under the provisions of Rule 78, a defendant in an action for divorce cannot be permitted to testify in her own behalf, to contradict the plaintiff, in respect to the matters as to which that rule allows the plaintiff to testify. (*Hennessey* agt. *Hennessey*, ante, 804.)
6. Although the amendment made to section 831 of the Code of Civil Procedure, in 1879, is very broad, it seems such amendment has not removed the restriction heretofore imposed by statute; as to parties to an action for a divorce testifying in their own behalf. (*Id.*)
7. In an action by plaintiff, against the executors of her father, to recover for her services performed for the deceased, at his instance and request, on the trial, in support of her claim, she called Mrs. Boyd, one of her sisters, a legatee named in the will of their deceased father, and she gave evidence tending to establish an employment of plaintiff by deceased, and an agreement to pay her wages if she would go to the house of the deceased testator and take charge of the housework and personally care for his wife, their mother, who was afflicted with paralysis. Subsequently in the case, her husband, Mr. Boyd, was called, and gave evidence tending to support an agreement to pay wages, and tending to show several payments made by the deceased on account thereof: Held, that Mrs. B. was not "called in her own behalf or interest," and was, therefore, competent as a witness in behalf of plaintiff.
Held, also, that the husband, Mr. B., was a competent witness. (*Pursell* agt. *Fry*, ante, 817.)
8. The trustee of an incorporated female seminary was, in 1838, a competent witness to a mortgage, executed by its president, when it is not shown that he was a stockholder thereof or had any pecuniary interest therein. (*Canandaigua Academy* agt. *McKeehn*, 19 Hun, 62.)
9. Where he adds to his answer an expression of his opinion, not responsive to the question, it may be properly stricken out on the motion of the party putting it. (*Ryan* agt. *People*, 19 Hun, 188.)
10. The provision of the Revised Statutes (2 R. S., 701, sec. 23), declaring a person sentenced upon a conviction for felony, to be incompetent as a witness, does not apply to a conviction in another state; it has reference only to a conviction in this state. (*Sims* agt. *Sims*, 75 N. Y., 466.)
11. It seems, that the fact that under the laws of another state where a conviction was had, a person convicted of the offense was incompetent as a witness does not affect his incompetency in this state. (*Id.*)
12. The provision of the United States Constitution declaring that full faith and credit shall be given to the records of other states (*U. S. Const.*, art. 4, sec. 1) does not

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require that personal disabilities imposed upon a person convicted of crime in one state, should follow him and be enforced in other states. (*Id.*)

13. As to whether a record of conviction of a witness for a felony, where it does not disqualify, is evidence in a civil action for the purpose of impeachment, *quære*. (*Id.*)

14. If competent, the record is not conclusive as to the fact of the commission of the crime charged, but may be rebutted. (*Id.*)

15. Defendant having testified as a witness in his own behalf, a record of his conviction in the state of Ohio for a felony was offered by plaintiff and received in evidence. Defendant was thereupon asked by his counsel whether he was

guilty of the offense of which he had been convicted. This was objected to and excluded.

Held, error. (*Id.*)

WRIT OF PROHIBITION.

1. The power of the general term to grant a writ of prohibition addressed to the special term, is to be exercised in the same manner and to the same effect as when it is issued to inferior courts and magistrates, and the inquiry relates only to the jurisdiction. Error or mistake in practice affords no foundation for the writ, unless it involves doing something contrary to the general law. (*The People ex rel. The Mayor agt. Nichols, ante, 200.*)

See SUMMARY PROCEEDINGS.

The People ex rel. Higgins agt. McAdam, ante, 442.

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